No. ① Supreme Court, U.S.
FILED

94 1471 MAR 6 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Floyd Abrams*
CAHILL GORDON & REINDEL
(a partnership including a professional corporation)
Eighty Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner

* *Counsel of Record*

Of Counsel:

Thomas J. Kavaler
Howard G. Sloane
Katherine B. Harrison
David G. Januszewski
Jonathan Sherman

William J. Koehn
Deborah M. Tharnish
DAVIS, HOCKENBERG, WINE, BROWN, KOEHN & SHORS
2300 Financial Center
Des Moines, Iowa 50309
(515) 288-2500

March 6, 1995

1930P

QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to sue on their own behalf for alleged breaches of fiduciary duty under ERISA?

2. When an ERISA-governed welfare benefits plan expressly reserves the right to terminate, amend or modify the plan, and when that reservation of rights is disclosed to plan participants and beneficiaries, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. 1993), for breach of fiduciary duty, where an employer fails to disclose its expectation that at some point in the future benefits will be terminated?

PARTIES BELOW

In the court below, in addition to the petitioner Varity Corporation, Massey-Ferguson Inc. was an appellant and cross-appellee. Massey-Ferguson Inc. has been merged into Varity Corporation and no longer exists as a separate entity, and accordingly, it is not named as a petitioner herein. Respondents in the court below (as appellees and cross-appellants) were Charles Howe, Robert Wells, Ralph W. Thompson, Patrick Mousel (on behalf of themselves and as representatives of a class of persons similarly situated), and John Altomare, Charles Barron, Alexander Charron, Charlotte Chiles, Anita Crowe, Ray Darr, Doris Guidicessi, Barnett Lucas, Robert Skromme, and the Estate of Walter Smith, individually.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, the Court is advised that petitioner is a publicly-traded company with no parent company. Other than wholly-owned subsidiaries, petitioner's only subsidiaries are Hayes Wheels International, Inc., Kelsey-Hayes de Mexico S.A., Topy Kelsey-Hayes, Limited, Varity Risk Management Services Limited, Motores Diesel Andinos S.A. and Motores Perkins S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Varity Corporation ("Varity") respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case, filed on September 29, 1994, rehearing and suggestion for rehearing *en banc* denied December 5, 1994, and clarified on December 8, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at 36 F.3d 746 and is reprinted in the Appendix hereto at 1a-21a. The

court's opinion granting petitioner's motion for clarification of its initial opinion is reported at 41 F.3d 1263 and is reprinted at 22a-23a. The district court opinions on post-trial motions (24a-115a) are unreported. A prior opinion of the court below in this case is reported at 896 F.2d 1107 and is reprinted at 116a-124a. The court's denial of rehearing and suggestion for rehearing *en banc* (125a) is unreported.

JURISDICTION

The opinion of the court of appeals of which petitioner seeks review was filed on September 29, 1994, and clarified on December 8, 1994. The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on December 5, 1994. This petition is being timely filed within 90 days of that denial.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Relevant portions of ERISA are set forth in the Appendix at 126a-149a, and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

Factual Background of This Action

This litigation arose out of the demise of Massey Combines Corporation ("MCC"), one of several farm equipment manufacturers that failed during the recession that devastated that industry in the 1980s, and the attendant loss of ERISA welfare benefits by its employees and retirees. MCC was created in May 1986 when Varity transferred a portion of the manufacturing operations of one of its wholly-owned subsidiaries, Massey-Ferguson Inc. ("MF") to MCC as part of a restructuring. MCC offered employment and welfare benefits (health and other insurance coverage) to certain employees of MF on terms identical to those they had enjoyed while in the employ of MF. MCC adopted verbatim the MF benefit plans.

MF provided benefits to its employees pursuant to the MF Benefit Plan (the "Master Plan"). In Section 7.4 of the Master Plan, MF explicitly "reserve[d] the right, by action of the Board, to amend or terminate the Plan or Trust at any time . . . ." (9a)

In December 1983, MF announced a significant cut-back in benefits by changing coverage for employees and retirees to a Comprehensive Major Medical Plan effective January 1, 1984. MF issued a memorandum to all employees and retirees that described the new coverage. (*See* 150a-154a) That memorandum stated on its schedule of benefits in solid capital letters:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR [i.e., the company] TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME." (154a)

In addition to having disclosed this reservation of rights in 1984, when it offered employment with MCC in 1986 petitioner distributed a letter introducing the new company. That letter affirmed that "pay levels and benefit programs will remain unchanged", but stated that "[e]mployment conditions in the future will depend on our ability to make [MCC] a success, and if changes are considered necessary or appropriate, they will be made."

On March 4, 1988, two years after its formation, MCC went into receivership in Canada and was forced to terminate all of its employees. MCC's receiver sent notice to all employees and retirees advising them that MCC had no funds to continue paying welfare benefits. (117a)

Procedural History of This Action

A. Initial Proceedings

On October 26, 1988, five former MCC employees initiated this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988 & Supp. V 1993), as amended, in the United States District Court for the Southern District of Iowa. Jurisdiction was predicated upon 29 U.S.C. § 1132 (1988 & Supp. V 1993), as amended, and 28 U.S.C. § 1331 (1988). Plaintiffs sought (i) a permanent injunction ordering petitioner to provide a purported class of plaintiffs, consisting of retirees of MCC who had previously worked for MF, with lifetime welfare benefits; (ii) severance pay for certain former employees of MF who worked for MCC at the time it was placed into receivership; and (iii) punitive damages.[1]

Petitioner moved to dismiss the complaint, and plaintiffs cross-moved for a preliminary injunction with respect to the retiree plaintiffs' claim for vested welfare benefits. The district court denied the motion to dismiss and granted the motion for a preliminary injunction. The preliminary injunction was reversed by the Court of Appeals for the Eighth Circuit on February 15, 1990, and the case remanded to the district court. (116a-124a)[2]

[1] Plaintiffs alleged that MF and Varity were liable as alter-egos of MCC or as former employers.

[2] The Eighth Circuit held that "the mere fact that employee benefit plans continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits." (120a) Because the plan documents at issue contained no promise of vested benefits, and contained a reservation of the right to amend or terminate the benefits, the court held that the retirees "are no longer entitled to these benefits." (121a)

B. Trial

The district court thereafter allowed two plaintiff classes (MCC retirees and former MCC employees seeking severance pay) and ten individual retirees (who had retired from MF prior to the formation of MCC) to proceed to trial in August 1991 on five legal theories: breach of contract, promissory estoppel, interference with protected rights, breach of fiduciary duty and fraudulent misrepresentation. After a seventeen-day trial, a jury found for plaintiffs on all claims and awarded plaintiffs almost $46 million, including $36 million in punitive damages. Judgment for $45,848,499 was entered on September 30, 1991.

C. Post-Trial Orders of the District Court

On March 26, 1993, the district court entered an Order (the "March Order") and separate Findings of Fact and Conclusions of Law (the "March Findings"). The district court struck entirely the punitive damage award, acknowledging that punitive damages are not available under ERISA. The court set aside the jury's award to the severance pay class on all claims, including breach of fiduciary duty, based on the governing plan documents. As to the retirees, the court dismissed their breach of contract claim seeking lifetime benefits pursuant to ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1988). The court held: "For plaintiffs to recover under this count they must show a contract for lifetime benefits which cannot be terminated. They cannot make such a showing in the face of section 7.4 [the reservation of rights in the benefit plan]." (35a) The court also dismissed as preempted the retirees' claim of fraudulent misrepresentation.

The district court held, however, that the retiree plaintiffs were entitled to lifetime welfare benefits under three different legal theories. First, the court held that petitioner had breached its fiduciary duties in failing to provide lifetime welfare benefits, notwithstanding that the retiree plaintiffs

had established no right to recover such benefits under § 502(a)(1). Second, the court held that petitioner had violated ERISA § 510, 29 U.S.C. § 1140 (1988), which bars interference with the attainment of ERISA-protected rights. Finally, the court held that petitioner was equitably estopped under federal common law from denying the retiree plaintiffs lifetime welfare benefits.[3]

On April 21, 1993, petitioner timely filed a Notice of Appeal to the Court of Appeals for the Eighth Circuit. Jurisdiction was invoked pursuant to 28 U.S.C. § 1291 (1988).

The Opinion of the Court Below

On appeal, the court below affirmed the district court's March Order and March Findings, with some modification as to relief.[4]

The court rejected the retiree claims for lifetime benefits under § 502(a)(1), because the "language [of the plan] unambiguously confers on the company the right to amend or terminate the Plan." (9a) Nevertheless, the court affirmed the district court's finding of liability as to retirees on the grounds that petitioner had breached its fiduciary duties under

[3] In the March Order, the district court offered the retiree plaintiffs the choice of (i) a permanent injunction reinstating them into the MF Plan and "compensatory damages" totalling $779,007.00 (amounting to "actual expenses" borne by the retiree plaintiffs); or, (ii) $8,312,332.00 equalling "damages past and future"—in other words, the equivalent of lifetime benefits—awarded by the jury. On April 15, 1993, plaintiffs elected to take the jury's award of money damages.

[4] The award of compensatory damages for lifetime benefits (elected by the retiree plaintiffs) was set aside; substituted for it was the alternative that plaintiffs had not chosen, and which was not part of the judgment entered by the district court: monetary relief "in the nature of restitution" as well as an injunction reinstating plaintiffs in the MF benefit plan. (18a)

ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1) (1988 & Supp. V 1993).[5]

The court held that plaintiffs were entitled under ERISA to assert claims on their own behalf for breach of fiduciary duty. The court found this right in ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), allowing participants and beneficiaries to obtain "other appropriate equitable relief". In its ruling, the court simply ignored the impact on this case of this Court's analysis in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 140-42 (1985), determining that ERISA establishes fiduciary duties for the benefit of plans and that breach of fiduciary duty claims can only be brought by a participant or beneficiary on behalf of a plan. The court of appeals adopted instead the reasoning of Justice Brennan's concurring opinion in *Russell*. 473 U.S. at 155. (*See* 13a-16a)

The court held that petitioner had violated its fiduciary duties to the retirees by misleading them as to the likely future financial viability of MCC. Since petitioner itself knew that "MCC had a negative net worth on the day it was created" (5a), and since " '[a]ll of MCC's officers . . . agreed that MCC's chances of survival were not good' " (6a), the court held that the failure to disclose those facts together with the failure to restate that, at some point in the future, the plan might be modified or terminated (4a-5a), was a breach of petitioner's fiduciary duties to plaintiffs. (12a-13a)

The opinion of the court acknowledged that plaintiffs could not recover lifetime benefits (or any benefits) under § 502(a)(1) because the plan terms unambiguously did not establish any such contractual obligation. The court did not dispute—or even so much as mention—that the reservation of the right to amend, modify or terminate the plan had been dis-

[5] The court did not reach the district court's findings of liability predicated upon interference with protected rights and equitable estoppel. (17a n.5)

closed in writing to employees and retirees in 1984 in an ERISA document, a fact found by the district court. (74a-75a, ¶¶ 90-92) Nor did the court mention the 1986 letter informing MF employees that "if changes are considered necessary or appropriate, they will be made." The court nevertheless held that petitioner's failure to disclose the likely future business prospects of MCC and to *redisclose* the reservation of rights previously disclosed (5a), went "beyond mere business decisions" and were breaches of fiduciary duty because they constituted " 'misleading communications to plan participants regarding plan administration . . . .' " (13a, quoting *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988)).[6]

A petition for rehearing *en banc* was denied, two judges voting to the contrary. (125a)[7]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PERMITTING INDIVIDUALS TO ASSERT FOR THEIR OWN BENEFIT CLAIMS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA IGNORES THIS COURT'S DECISION IN *RUSSELL* AND EXACERBATES A SPLIT IN THE CIRCUITS

The court of appeals held that ERISA authorizes individual participants in an ERISA-governed plan to assert, under

[6] Plaintiffs filed a cross-appeal seeking reversal of the district court's order setting aside the jury's award of punitive damages, the jury's finding of liability as to the severance pay plaintiffs, the jury's finding that petitioner had breached its "contract" to pay benefits pursuant to § 502(a)(1), and the jury's finding of fraudulent misrepresentation. The court denied plaintiffs' cross-appeal in all respects. (8a-11a)

[7] Judge Hansen, one of the two judges who voted in favor of granting rehearing *en banc*, had concurred in part with and dissented in part from the panel's ruling. (19a-21a)

ERISA § 502(a)(3) (148a), claims of breach of fiduciary duty for their own benefit. (16a) In so holding, the Eighth Circuit ignored this Court's reasoning in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), electing instead to follow Justice Brennan's concurring opinion in that case. Following a decision of the Seventh Circuit that likewise ignored the thrust of the Court's *Russell* opinion in favor of that of the concurrence, the Eighth Circuit's decision exacerbates a conflict in the Circuits. The Ninth and Eleventh Circuits, following *Russell*, have held that individuals may only assert fiduciary duty claims on behalf of a plan, not themselves, while the Third, Seventh and now the Eighth Circuits, following Justice Brennan's concurrence, have held to the contrary.

As this Court has previously explained, fiduciary duty liability under ERISA is established by ERISA § 409(a), 29 U.S.C. § 1109(a) (1988) (147a). *Russell*, *supra*, 473 U.S. at 139. Section 409(a), entitled "Liability for breach of fiduciary duty," provides:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title."

29 U.S.C. § 1109(a) (emphasis added).

In addition to establishing this fiduciary duty liability, ERISA provides a specific mechanism for its civil enforcement. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988) (148a), provides that "[a] civil action may be brought . . . by

the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

It is common ground that participants in an ERISA plan—like the plaintiffs below—may assert a claim of breach of fiduciary duty pursuant to §§ 409 and 502(a)(2). *Russell, supra*, 473 U.S. at 140. It is equally clear—and the *Russell* Court so held—that such a claim may only be brought on behalf of the ERISA plan, not on behalf of the plan participants or beneficiaries themselves. This Court reasoned:

> "Petitioner contends . . . that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary.
>
> "[W]hen the entire section [409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*. . . .' "

473 U.S. at 140 (emphasis in original).

In reaching its decision in *Russell*, this Court reviewed the several ERISA provisions establishing fiduciary duties. The Court noted that such fiduciary duties are set forth in ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993), entitled "Fiduciary Responsibility". 473 U.S. at 143. The Court specifically considered § 404—the section cited by the court below in this case as the basis for its finding a breach of fiduciary duty. (*See* 12a). Based upon its review of § 404 and

the other fiduciary provisions, this Court explained:

> "It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."

Id. at 142-43.

After reviewing the statutory provisions and the legislative history in detail, the Court noted "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole," 473 U.S. at 142 n.9, and that:

> "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."

Id. at 142.

Because the plaintiff in *Russell* disclaimed reliance on the other civil enforcement provisions contained in § 502(a), this Court noted that "we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." 473 U.S. at 139 n.5. The Court made clear, however, that its analysis of § 502(a)(2) cannot be divorced from the overall scheme of remedies provided by the statute: "[w]e are reluctant," the Court concluded, "to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979): '[W]here a statute expressly provides a particular remedy or

remedies, a court must be chary of reading others into it.' " *Russell, supra*, 473 U.S. at 146-47.

In his concurring opinion (joined by Justices White, Marshall and Blackmun), Justice Brennan criticized the Court's opinion because it "might be read as suggesting that the fiduciary duties imposed by ERISA on plan administrators for the most part run only to the plan itself, as opposed to individual beneficiaries." 473 U.S. at 151. Citing principles of the common law of trusts and "promotion of the best interests of participants and beneficiaries", *id.* at 158, Justice Brennan opined that § 502(a)(3) should be read to permit individual participants and beneficiaries to assert breach of fiduciary duty claims on their own behalves. *Id.* at 155.

The Court's reasoning in *Russell* was recently reaffirmed in *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), a case that did consider the remedies available under § 502(a)(3). Because the plaintiff in that case brought the action on behalf of a plan, the issue raised here was not presented. Rather, the Court held that extra-contractual damages were not available to a plaintiff asserting a breach of fiduciary duty claim under § 502(a)(3). In *Mertens*, the Court rejected arguments similar to those expressed by Justice Brennan in *Russell*. As Justice Scalia recalled: "In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Mertens, supra*, 113 S. Ct. at 2067 (quoting *Russell*) (emphasis in original). The *Mertens* Court specifically rejected the argument that a contrary result was necessary "in order to achieve the 'purpose of ERISA to protect plan participants and beneficiaries.' " *Id.* at 2071. The Court concluded:

> "There is . . . a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.' We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck."

Id. at 2072 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) and citing *Russell, supra*, 473 U.S. at 148 n.17).

In reaching its result below, the court of appeals read *Russell* so narrowly as to disregard its central message, choosing instead to follow Justice Brennan's concurring opinion. (15a) ("[w]e agree with the reasoning in Justice Brennan's concurring opinion in *Russell*"). The panel made no effort whatsoever to address the *Russell* majority's careful analysis of the ERISA provisions "defining the duties of a fiduciary" as well as the provisions "defining the rights of a beneficiary." *Russell, supra*, 473 U.S. at 140. Nor did the panel confront the *Mertens* Court's explicit rejection of the substitution of vague policy arguments for the text of the statute enacted by Congress. Instead, in contravention of this Court's reasoning in both *Russell* and *Mertens*, the court of appeals concluded that plaintiffs should be permitted to assert fiduciary duty claims on their own behalf under § 502(a)(3) because "a contrary holding would leave unredressed an egregious wrong." (16a)

In ruling that an individual could state a claim for breach of fiduciary duty on his own behalf, the Eighth Circuit joined with the Third and Seventh Circuits, which had previously ruled similarly in *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), and *Anweiler* v. *American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993).[8] Two other circuits, however, have far more faithfully

---

[8] In *Bixler*, the Third Circuit cited as support the Sixth Circuit's decision in *Warren* v. *Society National Bank*, 905 F.2d 975, 978-83 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991). The *Warren* court, however, considered the issue of whether monetary damages are available as "equitable relief" under § 502(a)(3), and did not directly address the issue raised here. The *Warren* court's holding was that the monetary damages claimed in that case were available under § 502(a)(3), a result now barred

applied the reasoning of the majority in *Russell* to hold that breach of fiduciary duty claims may not be brought on an individual's own behalf, but only on behalf of a plan.

The Ninth Circuit, in a series of decisions, has rejected arguments based on Justice Brennan's concurrence and has strictly adhered to the *Russell* majority's analysis of ERISA fiduciary duties. *McLeod* v. *Oregon Lithoprint Inc.*, No. 92-36928, 1995 WL 36112 (9th Cir. Feb. 1, 1995); *Horan* v. *Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991); *Sokol* v. *Bernstein*, 803 F.2d 532 (9th Cir. 1986). In *McLeod*, the Ninth Circuit took note of the fact that the *Russell* holding was limited to §§ 409 and 502(a)(2), but concluded that the majority's analysis was applicable to breach of fiduciary duty claims brought pursuant to § 502(a)(3). *See McLeod*, *supra*, 1995 WL 36112, at *3 ("[W]e [have] extended the Supreme Court's holding in *Russell*, which was limited to section 409(a), 29 U.S.C. § 1109(a), to section 502(a)(3), 29 U.S.C. § 1132(a)(3), as well."). In *McLeod*, the Ninth Circuit rejected the very argument adopted by the court below in this case—that claims may be brought under § 502(a)(3) to remedy breaches of the fiduciary duties set forth in § 404(a) (144a). 1995 WL 36112, at *3.

Similarly, in *Horan*, the Ninth Circuit ordered the dismissal of plaintiff's claims under § 502(a)(3) for declaratory and injunctive relief based on breach of fiduciary duty. The court explained that "the plaintiffs fail to present a fiduciary breach claim if the only remedy sought is for their own benefit, rather than for the benefit of the Plan as a whole." 947 F.2d at 1418. Finding that the equitable remedies sought by plaintiffs "would only benefit the plaintiffs and not the Plan," the court ordered that the claims be dismissed. *Id.*

by this Court's subsequent decision in *Mertens*. More recently, the Sixth Circuit has observed in dicta that "[i]t is well-settled that fiduciary liability under ERISA arises in favor of the plan itself, and that plan participants may not seek to recover in an individual capacity." *Tassinare* v. *American National Insurance Co.*, 32 F.3d 220, 222 (6th Cir. 1994).

The Eleventh Circuit has ruled similarly. In *Simmons* v. *Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991), that court vacated a judgment in favor of a plaintiff on a breach of fiduciary duty claim because the claim was brought on behalf of the individual plaintiff, not a plan. *Id.* at 617. Although the claim was brought pursuant to § 502(a)(1)(B), not § 502(a)(3), the Court made clear its view that *Russell* should be read broadly to limit any claims for breach of fiduciary duty:

> "A cause of action for an ERISA fiduciary's breach of its duties arises under 29 U.S.C. § 1109 rather than § 1132(a)(1)(B), and § 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duty."

Id. at 617 (citing *Russell*).

This Court's review of the decision below is necessary to resolve this conflict between the circuits regarding the import of this Court's decision in *Russell*. The decisions of the Third, Seventh and Eighth Circuits threaten to render § 502(a)(2) and *Russell* itself superfluous. As *Russell* made clear, the remedy for breach of fiduciary duty that Congress provided in § 502(a)(2) was carefully limited so as to protect the interests of plans as a whole, not individual participants. Yet the decision below, and those of the Third and Seventh Circuits, now permit all fiduciary duty claims to be brought under § 502(a)(3). Under those cases, individual participants in plans who desire to assert breach of fiduciary duty claims may ignore §§ 409 and 502(a)(2) altogether and instead assert their claims for their own benefit under § 502(a)(3). This Court should grant *certiorari* to resolve this conflict and to reestablish the careful balance struck by Congress in the text of ERISA.

II.

THE DECISION BELOW CREATES NEW FIDUCIARY DUTIES AND LIABILITY BEYOND THAT WHICH ERISA IMPOSES, IN CONFLICT WITH DECISIONS OF THIS COURT AND OF FOUR CIRCUITS

The court below imposed liability in this action based on its conclusion that in failing to disclose to employees and retirees a pessimistic internal assessment of MCC's future business prospects and to redisclose to employees and retirees a previously disclosed right to terminate benefits, petitioner was acting not as an employer making "mere business decisions", but as an ERISA fiduciary making " '[[m]]isleading communications . . . regarding plan administration' ". (13a) The ruling is consistent with decisions of four other circuits which have opined that even though an employer does not act as a fiduciary in amending, modifying or terminating a plan, it does act as a fiduciary once it gives "serious consideration" or "intends" to implement any plan change, but then misleads employees by failing to disclose or misrepresenting to them the impending action. *See Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988); *Eddy* v. *Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990); *Vartanian* v. *Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994).

These rulings—including that of the court below—directly conflict with decisions of four other circuits and rewrite ERISA to alter fundamentally the nature of the fiduciary duties it requires.

In *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), the court held that an employer did not act in a fiduciary capacity when it failed to "reveal that it intended to create a special severance plan for the divestiture" of one of its divisions. *Id.* at 1045. The defendant had unilaterally amended a severance policy to

the detriment of employees after deciding to sell off portions of the failing division. The defendant did not disclose the unilateral change in the plan nor its intention to rid itself of the division. The court reasoned that an employer "is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits." *Id.* Although revealing the intended change of plan terms might have been "desirable", the court held there was no "legal duty" to do so. *Id.* Accordingly, the Seventh Circuit affirmed dismissal of the employees' fiduciary duty claim.

The Court of Appeals for the Fifth Circuit has ruled similarly. In *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), plan beneficiaries brought claims for fraud and breach of the fiduciary duty of loyalty under ERISA § 404(a)—the very provision upon which the court below relied in ruling that petitioner had acted in a fiduciary capacity—because their employer had stated repeatedly that upon consummation of a merger with another company, any new pension plan would "set aside assets of the [new plan] to provide sufficient reserves for then-existing retiree pensions." *Id.* at 1322. When the merger took place, however, the employer failed to set aside any specific reserves. The Fifth Circuit affirmed the district court's dismissal of the fiduciary duty claim, noting that a plan beneficiary is entitled to rely *only* upon a "written plan document as required by section 402(a)(1) of ERISA." *Id.* at 1323. Moreover, the court held that the employer's statements "were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity as plan sponsor or settlor." *Id.* n.28.

In *Lea* v. *Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), the Court of Appeals for the Ninth Circuit ruled to the same effect. In *Lea*, plaintiffs alleged that an employer had breached its fiduciary duties in negotiating with plaintiffs' union to terminate a plan by failing to comply with promises to channel adequate benefits to several disabled employees

upon the plan's termination. *Id.* at 626. Plaintiffs alleged fraud and breach of fiduciary duty in the negotiation and execution of the termination agreement. The court rejected plaintiffs' claims and affirmed summary judgment for the employer because, in executing the termination agreement, the employer "did not perform fiduciary functions; its status as employer does not automatically make it liable as an ERISA fiduciary." *Id.* at 631. Citing the Seventh Circuit's decision in *Young, supra*, the court also held that the company was not "liable here for its role in negotiating the termination of the ERISA plan." *Id.*

Finally, in *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), plaintiffs alleged that the defendants had intentionally understated the amount of certain plans' unfunded liabilities in the course of the sale of certain of defendants' divisions. The court affirmed dismissal of fiduciary duty claims based on the transfer because "[i]n selling the unprofitable BK Divisions and structuring the transaction to include the existing pension plans, [defendants] were making a corporate business decision." *Id.* at 1189.

In these decisions, the Seventh, Fifth, Ninth and Third Circuits (in stark contrast to the court below and the Sixth, District of Columbia, First and Second Circuits) have explicitly declined to hold that an employer acts in a fiduciary capacity when it has decided to terminate benefits (or decided upon a course of action that will likely result in the termination of benefits), but fails to disclose or even misrepresents that information.

The decisions of the court below and of the four other circuits that have ruled similarly have upended ERISA by vastly expanding the nature of fiduciary duties owed to plan participants and beneficiaries by employers who also act as plan administrators. As this Court's *Russell* and *Mertens* decisions made clear in addressing fiduciary duties and liability under

ERISA, courts are strictly limited to enforcing what the text of ERISA *says—i.e.*, the provisions that resulted from Congress' careful balancing of competing interests. *See Mertens, supra*, 113 S.Ct. at 2072; *Russell, supra*, 473 U.S. at 148. Yet, citing the very same vague policy concerns rejected in *Mertens*, the court below reached beyond the text of ERISA to impose sweeping fiduciary duties on petitioner in an effort to find a remedy for what the court concluded was an "egregious wrong". (16a) The result of the court's effort finds no support in ERISA.

What ERISA does say is that

> "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988). (127a) Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993) (144a) requires any such fiduciary to "discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA.

ERISA, however, treats employee welfare benefit plans (which are at issue here) far differently from pension plans (which are not), and that difference is the starting point for understanding the extent to which the Eighth Circuit's decision below has expanded the fiduciary duties set forth in the statute. ERISA exempts welfare benefit plans, but not pension plans, from its stringent participation, accrual and vesting requirements, ERISA § 201(1), 29 U.S.C. 1051(1) (1988) (*see* 137a), and under ERISA's vesting rules, *only* accrued benefits must be nonforfeitable. ERISA § 203(a), 29 U.S.C. § 1053(a) (1988 & Supp. V 1993). (*See* 138a-142a) Thus, unlike pension plans,

ERISA does not require employers to provide welfare benefit plans. As the courts of appeals have routinely held, any rights to benefits under welfare plans are governed by the terms of the the plan documents alone, construed according to ordinary principles of contract interpretation.[9] Thus, if applicable welfare plan documents clearly reserve the right to amend or terminate a plan, employers are free to terminate benefits.

Congress chose to allow such latitude with respect to welfare benefits specifically to encourage employers to offer them. As the Report of the House of Representatives observed, the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; *accord Mertens, supra,* 113 S. Ct. at 2072 (noting " 'tension' " in text of ERISA between " 'primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs' ").

Accordingly, it is settled—and not even the court below disagreed (12a-13a)—that employers do not act in a fiduciary capacity when they decide to amend or terminate welfare benefits, or even when they make business decisions intended to rid employers of the costs associated with such

[9] *E.g., Bellino* v. *Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991); *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Hamilton* v. *Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir.), *cert. denied*, 112 S. Ct. 1479 (1991); *Sutton* v. *Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *United Paperworkers International Union* v. *Champion International Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Musto* v. *American General Corp.*, 861 F.2d 897, 906 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Ryan* v. *Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Alday* v. *Container Corp. of America*, 906 F.2d 660, 663 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

benefits—so long as those decisions are taken in accordance with the plan and its procedures.[10]

At the same time, there is no doubt that Congress did regulate the documentation and disclosure by fiduciaries of terms of welfare benefit plans. Congress determined that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). (*See* 143a) Thus, Congress recognized that fiduciaries must protect the settled expectations of participants and beneficiaries by providing them with clear and accurate information about available benefits, *Siskind* v. *Sperry Retirement Program, Unisys*, Nos. 336, 94-7120, 1995 WL 55494, at *8 (2d Cir. Feb. 6, 1995), but that there should be no "substantial disincentives for [employers to] offer[ ]" welfare benefit plans by requiring anything more. *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *see Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990).

[10] *E.g., Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA"), *cert. dismissed*, 474 U.S. 1113 (1986); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990) (an "employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administrators"); *accord Sutton* v. *Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Izzarelli* v. *Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *McGath* v. *Auto-Body North Shore, Inc.*, 7 F.3d 665, 670-71 (7th Cir. 1993); *United Paperworkers International Union* v. *Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386-87 (8th Cir. 1992); *Cunha* v. *Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986); *Averhart* v. *US West Management Pension Plan*, Nos. 92-1317, 1321, 1375, 1994 WL 588622, at *7 (10th Cir. Oct 28, 1994); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

In accordance with the balance struck by Congress between providing employees with access to plan information on the one hand and allowing employers the right to provide for welfare benefit plan termination or amendment on the other, ERISA sets forth in detail a fiduciary's obligations to report and disclose plan information to participants and beneficiaries. *See* ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1988 & Supp. V 1993) (*e.g.*, 128a-136a); *see also Russell, supra*, 473 U.S. at 143 (statutory duties of plan administrators require "disclosure of *specified* information") (emphasis added).

The opinion of the court below is not premised on violation of any of ERISA's detailed disclosure provisions, and that court did not find that the "misleading" statements made by petitioner violated any of those provisions. Nor did the court conclude that petitioner had misrepresented the terms of the plan or that there had been any violation of the terms of the plan itself. (Indeed, it found precisely the opposite since it ruled that plaintiffs could *not* recover benefits under § 502(a)(1).)

The court did, however, ignore a critical fact that plaintiffs did not dispute: that petitioner had distributed to all plaintiffs before the formation of MCC a memorandum that stated in block capital letters that:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR [i.e., the company] TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME."

(154a)[11]

[11] The district court determined that the 1984 memorandum was a summary of material modifications, *see* ERISA § 102, 29 U.S.C. § 1022 (1988) (74a-75a, ¶ 92), and that the memorandum had been distributed to all plaintiffs. (74a, ¶ 90) Although the district court concluded that the language set forth above was "ambiguous" (75a, ¶ 93), it did not even attempt to defend that proposition (which on its face is inaccurate); the court of appeals, in turn, failed even to mention the 1984 reservation of rights, let alone address the district court's insupportable observation about it.

Under these circumstances, the court's "failure to warn" theory of fiduciary liability, premised on petitioner's statements—or silence—at the time MCC was formed, added sweeping new ERISA obligations never contemplated by Congress. Nowhere do any of ERISA's disclosure provisions require plan administrators to furnish to participants information about a company's internal views—whatever those views might be—concerning the likelihood of the success of a business; nowhere do those provisions require notice of an employer's business decision to terminate a plan in the future; nowhere do those provisions require employers administering welfare benefit plans to provide *additional* disclosure of plan terms beyond the detailed requirements set forth in the statute; nowhere did the court explain how or why such nondisclosures constituted a decision concerning "plan administration".

In determining that these acts were undertaken by petitioner in its fiduciary capacity, the court below contravened this Court's admonitions in *Russell* and *Mertens* by circumventing the text of ERISA. The court simply invoked the talismanic phrase " 'duties of loyalty and prudence' " (13a) to find that petitioner was required to disclose its expectation that plaintiffs would ultimately lose benefits.[12] It did this without addressing how such a duty of disclosure could possibly exist

[12] *Compare Young, supra*, 849 F.2d at 1045 ("[t]hough perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of" failing division); *Borst, supra*, 36 F.3d at 1323 n.28 (employer's "statements [misrepresenting intent not to set aside plan reserves] were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity"); *Lea, supra*, 903 F.2d at 631; *Blaw Knox, supra*, 998 F.2d at 1190.

where petitioner was concededly permitted—in a nonfiduciary capacity—to terminate the plan; and without finding any violation of, or even mentioning, the detailed disclosure requirements set forth in the statute. In ruling that petitioner acted as a fiduciary, the court frustrated the balance struck by Congress between the obligations of employers to comply with ERISA's disclosure provisions and the desirability of creating incentives for employers to offer welfare plans in the first place.

Review by this Court is essential to resolve the inconsistency between the ruling herein and those in *Russell* and *Mertens*, to resolve the conflict between the ruling and those of four other circuits, and to clarify the nature of the fiduciary obligations imposed by ERISA when, as ERISA contemplates and as is so often the case, a business acts in the dual capacities of employer and plan administrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 6, 1995

Respectfully submitted,

Floyd Abrams*
Cahill Gordon & Reindel
(a partnership including a professional corporation)
Eighty Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner

* *Counsel of Record*

Of Counsel:

Thomas J. Kavaler
Howard G. Sloane
Katherine B. Harrison
David G. Januszewski
Jonathan Sherman

William J. Koehn
Deborah M. Tharnish
Davis, Hockenberg, Wine, Brown, Koehn & Shors
2300 Financial Center
Des Moines, Iowa 50309
(515) 288-2500

TABLE OF CONTENTS

APPENDIX[1]

---

[1] Typographical errors and omissions in unpublished opinions have not been corrected.

[2] The excerpt comprises the first four pages of a multi-page document, reprinted verbatim herein.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-2056SI, 93-2111SI

Submitted: January 19, 1994

Filed: September 29, 1994

Charles Howe; Robert Wells; Ralph W. Thompson; Charlotte Chiles; Patrick Mousel, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated; John Altomare, to the extent of his claims arising from becoming disabled while working for Massey Ferguson, Inc.; Charles Barron; Alexander Charron; Anita Crowe; Ray Darr; Doris Guidicessi; Barnett Lucas; Robert Skromme; and Estate of Walter Smith, individually,

Appellees/Cross-Appellants,

—v.—

Varity Corporation and Massey Ferguson, Inc.,

Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Iowa.

Before RICHARD S. ARNOLD, *Chief Judge*, HANSEN, *Circuit Judge*, and STOHR*, *District Judge*.

---

* The Hon. Donald J. Stohr, United States District Judge for the Eastern District of Missouri, sitting by designation.

RICHARD S. ARNOLD, *Chief Judge*.

This case arises under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. (ERISA). The plaintiffs are two classes of former employees of Massey Combines Corporation (MCC) and ten individual former employees of Massey-Ferguson, Inc. (M-F). The defendants are Varity Corporation, which controlled MCC, and M-F, Varity's wholly owned subsidiary. The District Court[1] held in favor of one class and the ten individual plaintiffs, and against the other class. We affirm, with some modification of the remedy. We hold, among other things, that individual plan beneficiaries have a right of action under ERISA, 29 U.S.C. § 1132(a)(3), for breach of fiduciary duty.

I.

We state the principal facts as found by the District Court. It is appropriate to use these findings as a predicate because the defendants do not contend that any of the findings are clearly erroneous.

M-F is a wholly owned subsidiary of Varity. It sells farm implements and related parts manufactured by other subsidiaries of Varity. On May 9, 1986, Varity formed MCC, a new entity, and transferred to MCC certain lines of business. This reorganization was given the name "Project Sunshine." MCC took over the manufacture and sale of self-propelled combines and four-wheel-drive tractors. Both of these product lines had been declining during the 1980s. The year 1986 was the all-time low for sales of self-propelled combines. Varity's purpose in forming the new concern was to put its bad eggs into one basket, so to speak. It would not have to show the large losses associated with the combines and tractors on its own financial statement, and it hoped to rid itself of substantial obligations for employee benefits due or to become due to workers in the transferred lines of business.

---

[1] The Hon. Donald E. O'Brien, Senior United States District Judge for the Northern and Southern Districts of Iowa.

In order to accomplish the latter objective, Varity needed to get the employees of M-F who had been engaged in selling self-propelled combines and four-wheel-drive tractors to transfer to MCC and become employees of the new corporation. M-F maintained for its employees and retired employees a number of benefits, including basic health, major medical, life insurance, vision care, hearing care, and dental benefits. These benefits were described in an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3). (The term "welfare benefits" is used in contradistinction to "pension benefits." No issue regarding pension benefits is raised on this appeal. All claims concerning pension benefits have been settled.) M-F's welfare-benefit plan is still in existence, but the plaintiffs, in the view of defendants, are no longer members of it, because, as we shall shortly see, they were transferred from M-F to MCC under circumstances that have given rise to this case.

Employees who had already retired from M-F (ten of whom are individually named plaintiffs) were simply transferred to MCC. They were not asked to agree to this transfer, nor were they even aware of it at the time it occurred. M-F and Varity simply purported to substitute the new entity, MCC, as the party obligated to provide welfare benefits to employees in the transferred product lines who had previously retired from M-F. Current employees of M-F, however, were asked to consent, and did consent, to leaving M-F and signing up with MCC. In order to obtain this consent, M-F and Varity made various representations to the M-F employees in question. They told the employees, among other things, that the new company had a bright future, and that the "financial restructuring [that] created Massey Combines Corporation . . . will provide the funds necessary to ensure its future viability." *Charles Howe et al. v. Varity Corp. et al.*, No. 4-88-CV-1598, p. 21 (S.D. Iowa, Findings of Fact and Conclusions of Law filed March 26, 1993), quoting the transcript of the video shown to the M-F employees made by an officer of Varity who became president and chief executive officer of MCC.

The District Court's findings about what the employees were told continue, describing a sheet distributed by management:

> 64. The question and answer sheet ("Q & A sheet") in Exhibits A and B contained eight questions and answers. Defendants developed these questions and answers in anticipation of the "many concerns" by the employees. Defendants purposefully made the questions and answers incomplete, confusing, evasive, and deceptive. Defendants developed more forthright questions and answers, but they opted not to publish them. (Exs. 42, 46, 47.)
>
> 65. Information in Exhibits A and B concerning benefits was very limited. That information included a side-by-side comparison showing that M-F's and MCC's benefits were identical. The only question dealing with benefits was number three. The answer simply stated that "benefit programs will remain unchanged." Defendants considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Defendants rejected this disclosure because they believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, Varity began to develop "creative and innovative ways" to reduce employee benefits. (Ex. 67.)
>
> 66. Defendants did not include in the Q & A sheet certain questions that they knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for termination pay from M-F. The employees also wanted to know if they could take early retirement from M-F. Defendants purposefully did not provide answers to these and other questions because they wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. (Ex. 47.) Defendants' failures to make these disclosures were to the detriment of the Retired and Terminated Classes.

> 67. Defendants knew they should tell the employees that they claimed the right to amend or terminate benefits in retirement. [One Varity official wrote to another] on April 15, 1986, as follows:
>
> > The following proposal results because of the govt's and lenders insisting that in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC.
>
> (Ex. 42.) Defendants ultimately decided to ignore the above set out proposal and not make the disclosure to the employees.
>
> 68. The representations made . . . regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading. Defendants knew the representations were materially misleading when they were made. Plaintiffs relied on these representations to their detriment.
>
> 69. Project Sunshine was, as mentioned above, a scheme designed, in part, to rid defendants of the obligations to pay benefits to retirees and employees of M-F.

Id. at 22-24.

In fact, when MCC was formed, it was "essentially bankrupt . . . ." *Id.* at 11. "The fair market value of the MCC common stock was zero or nominal. As of May 9, 1986, MCC had incurred on its books approximately $54 million in losses even though it had not been in operation. Inventory, receivables, and other assets that were transferred to MCC were overvalued by $46 million. . . . Similarly, MCC's liabilities, including unrecorded pension liabilities, were underestimated. In sum, MCC had a negative net worth on the day it was created (May 9, 1986), with liabilities exceeding assets by at

least $46 million. MCC started on May 9, 1986, with only $15,000 cash. It immediately drew on a line of credit and began liquidating assets to generate cash. MCC had little or no chance of survival from its onset. . . . All of MCC's officers . . . agreed that MCC's chances of survival were not good." *Id.* at 11-12.

It is no wonder, therefore, that Varity's chairman and chief executive officer bragged that he had "unloaded his losers all in one wagon" through Project Sunshine. Tr. 2652. This official also declared that "he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations. . . . He also [said] that he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." *Id.* at 2652.

As expected by its principals, but not by the transferred employees, MCC failed. It went into receivership on March 4, 1988. As a result, employees of MCC stopped receiving welfare benefits. Retired employees of M-F who had been transferred without their knowledge to MCC learned for the first time of the transfer, and they also stopped receiving welfare benefits. People working for MCC at the time of its demise lost their jobs without severance pay.

II.

Three groups of employees are plaintiffs in this case. Ten named individuals had already retired from M-F at the time MCC was created. They make up the first group. The other two groups are classes of employees: the Retired Class, made up of workers who transferred from M-F to MCC and retired before MCC failed, and the Terminated Class, made up of employees who were with MCC until the end and lost their jobs when it went into receivership. The Terminated Class claims wrongful deprivation of severance or termination pay. The individual plaintiffs and the Retired Class claim wrongful deprivation of welfare benefits.

This case was tried to a jury for 17 days.[2] The plaintiffs asserted five different theories of relief: (1) breach of contract, that is, failure to pay welfare benefits in accordance with the defendants' welfare-benefit plan, see 29 U.S.C. § 1132(a)(1)(B); (2) estoppel; (3) breach of fiduciary duty in violation of 29 U.S.C. § 1104(a); (4) fraudulent misrepresentation; and (5) interference with rights protected by the statute, in violation of 29 U.S.C. § 1104. The jury returned verdicts for all three groups of plaintiffs under all five theories. It awarded the following amounts:

To the Retired Class, $7,600,000, including past-due benefits, as of the time of trial, of $696,195.

To the Terminated Class, $1,536,117, representing unpaid severance pay.

To the named individual plaintiffs, $712,332, including past-due benefits, as of the time of trial, of $82,812.

The jury also returned verdicts for punitive damages of $3 million against M-F and $33 million against Varity.

On post-trial motions filed by defendants, the District Court, in two comprehensive and painstaking opinions, set aside the jury's verdicts in part. It granted judgment as a matter of law in favor of defendants with respect to the claim of the Terminated Class. It set aside in their entirety the awards of punitive damages. As for the Retired Class, the District Court rejected as a matter of law the theories of breach of contract and fraudulent misrepresentation, the latter on the basis of preemption by ERISA. The Court upheld the jury's decision on the claims of interference with protected rights, estoppel, and breach of fiduciary duty. It then gave the win-

[2] In *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982), we held that suits under 29 U.S.C. § 1132 to recover present or future benefits under ERISA are equitable in nature, and that there is no right to trial by jury. *Accord*, *Kirk v. Provident Life & Acc. Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991). No harm has been done by submitting this case to a jury, however, because the District Court has prudently made its own findings of fact. We thus have before us for review a judgment based on findings by the appropriate trier of fact.

ning plaintiffs a choice. They could either take the money awarded by the jury as compensatory damages—$7.6 million to the Retired Class and $712,332 to the individual plaintiffs —or they could elect the following alternative relief:

Payment to the Retired Class of $696,195 in past-due benefits

Payment to the individual plaintiffs of a total of $82,812 in past-due benefits

Reinstatement of the Retired Class and the individual plaintiffs as members of the M-F Welfare Benefits Plan as it existed on the dates of their retirement.

Retention of jurisdiction to decide details and incidents of relief, including payment of benefits accrued but not paid between the time of trial and the date of plaintiffs' reinstatement.

The plaintiffs elected to receive the sums awarded by the jury. Both sides have appealed.

III.

We first address the issues raised in the plaintiffs' cross-appeal, No. 93-2111. The principal such issue is the propriety of the District Court's rejection of the claim of the Retired Class for breach of contract. (We use the phrase "breach of contract" as a kind of short-hand here. We do not mean a common-law claim for breach of contract, arising under state law. Such a claim is, no doubt, preempted by ERISA. We refer instead to a claim under ERISA itself, 29 U.S.C. § 1132(a)(1)(B), brought by beneficiaries to recover benefits due under the Welfare Benefits Plan, to enforce their rights under the Plan, and to clarify their rights to future benefits under the Plan.)

The District Court rejected this claim on the basis of Section 7.4 of the Plan itself, which reads as follows:

The Company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employee shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.

This language unambiguously confers on the company the right to amend or terminate the Plan. It is fatal to the claim of the Retired Class that, once they had retired from M-F, their right to welfare benefits became vested for life. We so held in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990) (*Howe I*), in which we reversed the District Court's grant of a preliminary injunction in favor of the Retired Class. That holding is the law of the case.

It is true that rulings on motions for preliminary injunction are sometimes tentative, in that they may be based on an incomplete factual record, or on a preliminary assessment of the equities of the case, including the likelihood of success on the merits. But, as we remarked in *Howe I*, "an appellate court reviewing the grant or denial of a preliminary injunction may also determine whether the district court based its decision on an erroneous legal premise." *Id.* at 1109 n.3. In such a case, "[w]e . . . may reach the legal issues at the heart of the case," *ibid.*, and that is exactly what we did in *Howe I*. We squarely rejected plaintiffs' efforts to explain away Section 7.4. We also necessarily rejected plaintiffs' arguments based on a pamphlet called *You & M-F*. That pamphlet was before us on the prior appeal. These holdings were binding on the District Court on remand. We also, on this subsequent appeal, are obliged to follow them unless the law has changed, which it has not, or some clear and unmistakable miscarriage of justice will occur, which it will not. We affirm the District

Court's ruling rejecting plaintiff retirees' breach of-contract claim as a matter of law.

We also agree with the District Court's ruling as a matter of law for defendants against the Terminated Class. For many years, M-F paid severance pay to terminated employees under a policy contained in its Personnel Administration Manual (PAM). MCC continued the same policy, but when it went bankrupt, the receiver refused to pay any of the employees' severance pay. The Terminated Class contends that the PAM promises severance pay to any employees who are terminated for reasons beyond their control, which is certainly what happened to those persons who were employed by MCC at the time of its demise. However, the employees' right to severance pay is controlled by the language in the PAM. That manual expressly states:

> The publication of the practice outlining conditions for payment and the schedule of allowance *does not constitute a contractual relationship with the employee.* The termination allowance procedure represents present company practice, administered at the Company's sole discretion *which may be amended by the company without prior notice.* (Emphasis added.) (App. 613.)

PAM Section 5.01(III)(B). The employees' attempt to recover MCC severance benefits from Varity[3] has no support in the language of the PAM. The relevant provision expressly states that it "does not constitute a contractual relationship with the employee." Therefore, Varity's refusal to pay severance benefits was consistent with the plain language of the plan, and the language does not create any reasonable expectation that terminated employees would be entitled to severance pay.

We also agree with the District Court's action in setting aside the jury's awards of punitive damages against M-F ($3 million) and Varity ($33 million). Only equitable relief, as opposed to damages, is available under ERISA, see *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), and punitive

[3] Defendants agree, for purposes of this appeal, that Varity and M-F are alter egos of MCC. Thus, if MCC owes severance pay, Varity and M-F would be liable for it.

damages are not, by any stretch of the imagination, equitable relief. "Damages are damages, and an award of damages is a legal, not an equitable, remedy." *Id.* at 761.

On their cross-appeal, plaintiffs also challenge the District Court's rejection of their fraudulent-misrepresentation theory. The District Court held that "any claim for fraudulent misrepresentation is preempted by ERISA." *Charles Howe et al. v. Varity Corp. et al.*, Civil No. 88-1598-E, p. 27 (S.D. Iowa, Order filed March 26, 1993). We have held that a state-law claim of fraudulent misrepresentation is preempted by ERISA. *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). Acts of fraud may be relevant to an ERISA claim. They may even be actionable under ERISA, but if they are, it is because they violate the statute, not because they would be tortious under the common law of any state. Accordingly, the District Court was correct in rejecting a free-standing claim of fraudulent misrepresentation. Whatever fraud occurred must be analyzed in the context of the statute, and we shall do just that when we consider defendants' appeal, in the next part of this opinion.

IV.

Defendants' appeal is No. 93-2056. At the outset, they contend that *Howe I* is a complete obstacle to any form of relief in favor of plaintiffs. *Howe I*, defendants say, held that plaintiffs had no right to benefits because of Section 7.4 of the Plan. We believe defendants read *Howe I* too broadly. We did hold, as previously explained, that plaintiffs had no right to relief for breach of contract based on the documentary evidence in the record at that time, including the Plan itself and the summary description of the Plan, the pamphlet *You & M-F*. We also held that because these documents were unambiguous on their face, it was not proper to rely on extrinsic evidence.

These statements, however, must be read in context. The type of extrinsic evidence we were referring to was not that

defendants had fraudulently induced employees to transfer to MCC, but rather had to do with alleged past practices on the part of defendants, which practices, plaintiffs argued, had exempted retired employees from changes in the Plan. See 896 F.2d at 1110. Moreover, we observed that "[p]laintiffs have not argued estoppel, nor have they suggested any detrimental reliance on defendants' practices." *Ibid.* It seems clear to us, therefore, that *Howe I* cannot be read as foreclosing a theory of breach of fiduciary duty. Certainly plaintiffs are now arguing that such a breach occurred because of defendants' fraudulent misrepresentations and plaintiffs' detrimental reliance on them. We hold that *Howe I* does not bar plaintiffs from urging, on the present appeal, that they are entitled to relief on the basis of breach of fiduciary duty, estoppel, or interference with protected rights. *Cf.* 896 F.2d at 1110-11 (claim of breach of fiduciary duty with respect to benefits vesting after the 1986 transfer but before MCC went into receivership in 1988 must await "a more fully developed record and more carefully-considered factual findings than those before us.").

We turn to a discussion of the merits of plaintiffs' breach-of-fiduciary-duty claim. We have no doubt, and we do not understand defendants to dispute, that the conduct defendants engaged in, according to the findings of the District Court, was a breach of fiduciary duty in the generic sense. The statute, 29 U.S.C. § 1104(a)(1), provides, among other things, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." As Judge Posner remarked with typical directness in *Peoria Union Stockyards Co. v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983): "Misrepresentations and omissions [are] breaches of . . . fiduciary obligations. Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)."

It is true that not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the pros-

perity of the company, the assets of the plan, or the interests of plan beneficiaries. Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty. Plaintiffs' proof here, however, goes beyond mere business decisions on the part of defendants. "[M]isleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). "[A] fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed." *Ibid.* See also *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 n.11 (3d Cir.) (holding a fiduciary is under a duty to communicate material facts to a plan beneficiary), *cert. denied*, 454 U.S. 898 (1981).

Indeed, in some instances a fiduciary's duty goes beyond merely refraining from making affirmative misrepresentations. A fiduciary can also have a duty to disclose, "a duty . . . to advise [a beneficiary] of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer . . . . 'A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.' " *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750-51 (D.C. Cir. 1990) (Wald, C.J.), quoting *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 380 (1918) (Cardozo, J.).

Defendants, however, insist—and this is their principal argument on appeal with respect to the breach-of-fiduciary-duty claim—that there is simply no right of action for such a breach on the part of individual beneficiaries for their own benefit. Any such right of action, they argue, exists only on behalf of the Plan itself and cannot inure to the benefit of individual participants, whatever defendants may have done. In order to evaluate this argument we look first to the words

of the statute, specifically to Section 1132 of Title 29, the section that creates rights of action for violation of ERISA. Section 1132(a) reads in pertinent part as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

Defendants cite *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), but this case holds only that individual plan participants have no right of action for extra-contractual compensatory or punitive damages for breach of fiduciary duty (in that case, improper or untimely processing of benefit claims). (We take the phrase "extra-contractual damages" to mean damages other than the payment of benefits owed under a plan. In *Russell* all benefits owed had been paid; additional damages for the delay in payment, including mental distress, were at stake.) *Russell* involved only Section 502(a)(2) of the statute, 29 U.S.C. § 1132(a)(2), quoted above, and plaintiff in *Russell* expressly disclaimed reliance on Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

In the present case, by contrast, it is precisely paragraph (3) on which plaintiffs rely. The plain language of the statute cer-

tainly favors their position: "A civil action may be brought . . . by a participant [or] beneficiary . . . to enjoin any [violation] . . . of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce . . . this subchapter or the terms of the plan . . . ." Here, participants and beneficiaries seek to enjoin their exclusion from the M-F Plan, an exclusion which they claim violates the fiduciary duties imposed by Section 1104, and they also seek other appropriate equitable relief to redress past violations of the same section. But for defendants' breach of fiduciary duty, plaintiffs say, they would never have transferred to MCC, they would have been employees of M-F when they retired, and they would still be receiving benefits under the M-F Plan, which has not been terminated. We agree with the reasoning in Justice Brennan's concurring opinion in *Russell*. In his view, ERISA was intended to incorporate the law of trusts, and "it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." 473 U.S. at 152-53 (Brennan, J., concurring in the judgment). Section 502(a)(3) is available to enforce these duties. It "authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' '*any* act or practice which violates *any* provision of this title or the terms of the plan.' . . . A beneficiary therefore may obtain 'appropriate equitable relief' whenever an administrator breaches the fiduciary duties set forth in section 404(a) [29 U.S.C. § 1104(a)]." *Id.* at 153-54 (Brennan, J., concurring in the judgment) (footnotes omitted and emphasis in original).

This Court has previously awarded individual relief to plan beneficiaries for a breach of fiduciary duty. *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984) (specifically referring to 29 U.S.C. § 1104(a)(1)(B)). As defendants point out, *Monson* does not refer to any particular paragraph of Section 502(a), 29 U.S.C. § 1132(a), and reliance on Section 502(a)(2), 29 U.S.C. § 1132(a)(2), is now foreclosed by *Russell*. But Section 502(a)(3), 29 U.S.C. § 1132(a)(3), remains available, for reasons explained above. The Seventh

Circuit has recently so held, in a case involving not affirmative misrepresentations, but simply the failure to give a plan participant full and complete material information. *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993) ("An individual may seek equitable relief from a breach of fiduciary duty under section 1132(a)(3)").

Defendants cite *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), but nothing in *Mertens* is inconsistent with the position taken here. *Mertens* simply holds that only "equitable relief" is available under Section 502(a)(3), 29 U.S.C. § 1132(a)(3), and that this phrase does not include the collection of damages from persons who are not fiduciaries but act in concert with those who are fiduciaries. Nothing in *Mertens* precludes an award of traditional equitable relief, including an injunction, restitution, and the like. As plaintiffs now concede, Brief of Plaintiffs-Appellees p. 30, after *Mertens*, compensatory damages are not recoverable under Section 1132(a)(3). But the case by no means bars equitable relief for individual participants who have suffered a breach of trust. See also *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993), holding that compensatory damages are not available as "equitable relief" in a suit brought by a plan participant under Section 502(a)(3).

In sum, we reject defendants' submission that individual participants or beneficiaries injured by a breach of fiduciary duty have no right of action under Section 502(a)(3) for their own benefit. In reaching this conclusion, we follow the reasoning of the Seventh Circuit in *Anweiler, supra*, which was decided after *Mertens*. It is also not irrelevant that a contrary holding would leave unredressed an egregious wrong. As the District Court found,

> Defendants' conduct in designing and implementing Project Sunshine was willful, wanton, malicious, and in bad faith vis-à-vis all plaintiffs.
>
> * * *

> Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company . . . . ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

Charles Howe et al. v. Varity Corp. et al., No. 4-88-CV-1598, pp. 39, 80 (S.D. Iowa, Findings of Fact and Conclusions of Law filed March 26, 1993).

We hold that the District Court was correct in granting relief to the Retired Class for breach of fiduciary duty.[4]

V.

The remaining claim, brought by individual employees who had already retired from M-F at the time of the creation of MCC, needs only brief discussion. As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. *Restatement (2d) of Contracts*, Section 318(3), comment *d*. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.[5]

---

[4] M-F and Varity do not deny that they are fiduciaries for purposes of the statute.

[5] Because we are upholding the claim for breach of fiduciary duty on behalf of both the Retired Class and the individual named plaintiffs,

VI.

It remains to discuss the appropriate form of relief. In our view, under *Mertens* and *Novak*, the judgments for compensatory damages, $7.6 million to the Retired Class and $712,332 to the ten named individual plaintiffs, cannot stand. Such a judgment is legal relief, not equitable, and is not available under Section 502(a)(3). Rather, plaintiffs are entitled to receive the alternative form of relief offered to them by the District Court at the conclusion of its findings of fact and conclusions of law filed on March 26, 1993. The Retired Class should receive $696,195, an award in the nature of restitution to compensate them for benefits of which, at the time of trial, they had been deprived. The Retired Class should also receive restitution for benefits accrued between the time of trial and the entry of a final decree on remand. Finally, they are entitled to an injunction reinstating them as members of the M-F Welfare Benefits Plan under the terms of that plan as it existed at the time of retirement. Similarly, the named individual plaintiffs should receive as restitution the amounts set opposite each of their names on page 81 of the District Court's findings of fact and conclusions of law, totalling $81,812, plus an amount to compensate them for benefits accrued but not paid between the time of trial and the entry of a final decree on remand. In addition, they are entitled to an injunction reinstating them as members of the M-F Plan as of the time of their purported "transfer" to MCC.

In this way, the Retired Class and the individual plaintiffs will be restored to the position they would have occupied if the misrepresentations described in this opinion had never occurred. They will be members of the M-F Welfare Benefits Plan, which has not been terminated.

The relief awarded includes payments of money that plaintiffs would have received if they had remained members of the M-F Plan, but we do not think these payments can properly be characterized as "damages," and thus unavailable

it is not necessary for us to discuss the alternative bases of relief, estoppel and interference with protected rights.

under Section 502(a)(3). Rather, we view the payments as restitution. Equity will treat that as done which ought to have been done. Or, to put it in words that fit the present case more precisely, equity will disregard that which ought not to have been done. Plaintiffs should never have been lured away from M-F into the financially shaky MCC. The payments we are ordering are exactly what plaintiffs would have gotten if they had remained at M-F. They are restored to their rightful position. This is restitution, and the Supreme Court in *Mertens* twice lists "restitution" as a type of equitable relief available under Section 502(a)(3). 113 S. Ct. at 2068, 2069. The statute itself mentions not only injunctions but also "other appropriate equitable relief (i) to redress . . . violations" of ERISA. Section 502(a)(3)(B). Payments of past-due benefits are analogous to awards of back pay in Title VII cases, relief uniformly regarded as equitable. *Cf. Mertens*, 113 S. Ct. at 2068 (analogizing the remedies available under ERISA to those available under Title VII.)

* * *

The judgment of the District Court is affirmed, subject to the modification of relief described in this opinion. The cause is remanded to that Court with instructions to enter a final decree not inconsistent with this opinion. Plaintiffs are awarded their costs in this Court.

HANSEN, *Circuit Judge*, concurring in part and dissenting in part.

I concur in Parts I through V of the court's opinion. I respectfully dissent from Part VI. I do so for two major reasons.

First, the remedy that our court awards the individual plaintiffs and the retired class is the very relief which the district court offered to them as an "election of remedies" and which they specifically rejected. (*See* Findings of Fact and Con-

clusions of Law of Judge O'Brien at 80 (Mar. 26, 1993) (offer); Appellees' App. at 5 (election of remedies)). Because the plaintiffs elected to take a judgment for the $7.6 million and the $712,332 monetary damage awards awarded to them respectively by the jury, it is that judgment which was appealed, and it is that judgment (and not the rejected alternative remedy) upon which the briefs and argument focused our appellate attention. In short, the correctness and validity of the alternative relief now awarded has not been tested in our appellate crucible.

Second, when the district court offered the plaintiffs the sums of money which our court now awards as being "other appropriate equitable relief" under 29 U.S.C. § 1132(a)(3) "in the nature of restitution" (*ante.* at 19), the district court very clearly determined those sums to be a "judgment for compensatory damages (actual expenses)" as to the individual plaintiffs, and to be a "judgment for compensatory damages . . . in the amount of $696,195" for the retired class. (Findings of Fact and Conclusions of Law at 81.) In his fact-findings numbered 117 and 119, the district judge characterized the same amounts as "the value of past benefits lost." (*Id.* at 41.) In *Novak v. Anderson Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), we noted that funds to which a beneficiary was entitled under an ERISA plan (amounts which we then called "contractual damages") were not recoverable as an equitable remedy. Instead we deemed them recoverable as a legal remedy under a different ERISA provision. We said: "ERISA also provides a legal remedy, which allows a beneficiary to recover monetary damages for benefits owed under the plan." *Id.*

"Past benefits lost" (the district court's factual characterization) are, in my view, the same as "monetary damages for benefits owed under the plan", and under *Novak* are legal and not equitable relief. "Damages are damages, and an award of damages is a legal, not an equitable remedy." *Novak*, 962 F.2d at 761. A review of the transcript of the testimony of the individual plaintiffs reveals that more than the value of the benefits they lost under the plan has been included in the amounts the court now awards as restitution. In fact, included in the

awarded individual amounts are sums that the individual plaintiffs expended as premiums for replacement health insurance policies when their plan provided benefits ceased. I have great difficulty in seeing those sums as "restitution." To me they are traditional consequential legal damages and unrecoverable under § 1132(a)(3). Indeed, as the court points out (*ante.* at 17), the plaintiffs themselves now concede that after *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993), compensatory damages are not recoverable under § 1132(a)(3). The district court clearly called these amounts "compensatory damages." In my view our court has taken what the trial court determined were "compensatory damages" and which we said two years ago in *Novak* were a legal and not an equitable remedy, and has fashioned equitable relief by calling it all by another name, i.e., in the nature of restitution. Thus I decline to join in Part VI of the court's opinion. Instead, I would remand this case to the district court for the crafting of appropriate equitable relief.

Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-2056SI, 93-2111SI

Filed: December 8, 1994

Charles Howe; Robert Wells; Ralph W. Thompson; Patrick Mousel, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated; John Altomare; Charles Barron; Alexander Charron; Charlotte Chiles; Anita Crowe; Ray Darr; Doris Guidicessi; Barnett Lucas; Robert Skromme; and Estate of Walter Smith, individually,

Appellees/Cross-Appellants,

—v.—

Varity Corporation and Massey Ferguson, Inc.,

Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Iowa.

Before RICHARD S. ARNOLD, *Chief Judge*, HANSEN, *Circuit Judge*, and STOHR,* *District Judge*.

* The Hon. Donald J. Stohr, United States District Judge for the Eastern District of Missouri, sitting by designation.

PER CURIAM.

We have before us the motion of appellants for a clarification of our opinion filed September 29, 1994.

The motion is granted, and we offer the following additional explanation and guidance for the benefit of the District Court on remand.

It was not our intention to give any reinstated persons rights that do not appertain generally to members of the MF plan as it now exists. Any entitlement that the reinstated persons have with respect to past benefits (and we include in this phrase benefits accrued since the trial) will be taken into account when restitution is made on remand and the District Court adjusts the amount of restitution as appropriate in light of intervening events. As for the future, the right to modify the plan exists to the full extent indicated by our opinion, subject of course to any applicable requirements of law and to any claim that any future modification is retaliatory with respect to, or discriminatory against, the plaintiffs in this case.

On remand, the District Court should have these remarks in mind and is free to fashion, after hearing the views of the parties and any additional evidence that it may find relevant, a more detailed decree, not inconsistent with our previously filed opinion.

In addition, appellees have requested by letter certain technical amendments to the caption. Appellants do not object. The request for amendments to the caption is granted, and the caption on this opinion has been amended accordingly.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

ORDER

Defendants' motion for judgment as a matter of law and, in the alternative, motion for a new trial as to the verdicts the Jury rendered, bring this matter before the court. This order deals with legal issues raised in the attack on the jury verdicts and is therefore separate from the Court's findings on equitable issues which are set out in a separate order filed today.[1] After careful consideration of the written and oral arguments of the parties, as well as extensive review of the transcript, trial notes, and exhaustive independent research, the court denies the motions in part and grants in part.

[1] See the Court's Findings of Fact and Conclusions of Law also filed today [48a-115a]. The court incorporates the Findings of Fact and Conclusions of Law Order herein by reference.

In this Order on post-trial motions, the court has, in summary:

1. Set aside the jury verdict on the breach of contract claim.
2. Affirmed the jury verdict on the interference with protected rights claim as in pertains to the MCC Retired Class and the individual plaintiffs, but has set aside the jury verdict on this claim that was awarded to the MCC Terminated Class.
3. Set aside the jury verdict on the fraudulent misrepresentation claim.
4. Set aside the jury verdicts for the MCC Terminated Class on all of its claims.
5. Set aside the jury award of punitive damages.
6. Given the plaintiffs a choice of what relief they prefer.

FACTS AND PROCEDURAL HISTORY

In the late 1970s, Massey-Ferguson ("M-F") began to experience financial difficulties, which continued through 1986. In 1986, Varity Corporation ("Varity"), the parent company of M-F transferred a portion of M-F's operation to a newly created Canadian corporation, Massey Combines Corporation ("MCC"). Approximately 1,500 employees were "transferred" to MCC under this transaction. MCC shortly thereafter failed, went into receivership, and terminated its employees. The original plaintiffs in this action represented retirees, disabled employees, and their survivors and eligible dependents, of M-F and MCC. Plaintiffs brought this suit to recover benefits under ERISA from M-F and its parent corporation, Varity.

This court granted a preliminary injunction in favor of the plaintiffs, conditionally recognizing the plaintiffs as a class and finding that the ERISA plan documents entitled the retirees to continued benefits throughout their lifetime. The

defendants took the case to the Eighth Circuit on interlocutory appeal and prevailed in part. The Eighth Circuit reversed this court's grant of a preliminary injunction so far as it was directed toward retirees.[2] The Circuit Court held that section 7.4 of the "master plan" contains an express reservation-of-rights clause which precludes a finding that retirees' rights to benefits vest on retirement. This court, following the release of the circuit court's opinion in *Howe I*, held a hearing on defendants' motion for summary judgment. During the consideration of the motion it became unmistakably clear to the court that the parties' interpretations of the Circuit Court's opinion were vastly different. The parties' difference of opinion concerning the meaning and application of the Eighth Circuit's order formed the basis of a continuing dispute which was a constant shadow over this case. In an attempt to obtain a clarification of the Circuit's holding in *Howe I*, this court granted a partial summary judgment on defendants' motion for summary judgment as it pertained to retirees' claims and this court entered an order allowing the parties to attempt an interlocutory appeal. The Eighth Circuit Court of Appeals denied the interlocutory appeal and said: "We feel that this issue can be reviewed by the court at the conclusion of all proceedings." *Howe v. Varity*, No. 90-8125, slip op. at 2 (8th Cir. November 14, 1990).

Upon the release of the opinion denying the interlocutory appeal, plaintiffs filed their motion for reconsideration of the grant of summary judgment. In this court's order of June 4, 1991, the granting of a partial summary judgment was reversed and the plaintiffs' application for class certification was granted. The court created two subclasses and allowed ten individual retirees to intervene. The first subclass was comprised of those persons who retired from MCC before MCC entered receivership (MCC Retired). The second subclass was comprised of those persons who were working for MCC and were terminated when MCC went into receivership (MCC Terminated).[3]

2 *See Howe v. Varity*, 896 F.2d 1107, 1110 (8th Cir. 1990).

3 The parties settled the claims of all disabled plaintiffs prior to trial.

The court after a careful review of the emerging law in the ERISA field decided to allow this matter to proceed to a jury trial on such issues that were legal in nature and to view the jury's findings on the questions that were equitable in nature as advisory. In addition, after considerable review of the emerging case law in the ERISA, area this court allowed the question of punitive damages to be submitted to the jury for their consideration.

After 17 trial days, the jury returned a verdict in favor of the plaintiffs on five theories of recovery[4] and awarded the MCC Retired Class $7,600,000 and the MCC Terminated Class $1,536,117.

The jury made the following awards to the ten individual plaintiffs:

John Altomare	$ 80,000
Charles Barron	$ 72,000
Alexander Charron	$ 48,554
Charlotte Chiles	$ 45,000
Anita Crowe	$ 49,013
Ray Darr	$ 100,000
Doris Guidicessi	$ 50,000
Barnett Lucas	$ 100,810
Robert Skromme	$ 74,955
Estate of Walter Smith	$ 92,000
Total	$ 712,332

The jury awarded $3,000,000 in punitive damages against Massey-Ferguson, Inc. and $33,000,000 in punitive damages against Varity Corporation.

4 The five grounds for recovery were; breach of contract, promissory estoppel, breach of fiduciary duty, fraudulent misrepresentation, interference with protected rights.

DISCUSSION[5]

LAW OF THE CASE

This case as noted above, went up to the Eighth Circuit Court of Appeals on an interlocutory appeal of this court's injunction prohibiting defendants from denying welfare benefits to the plaintiff class. This court issued its injunction order following limited discovery by the parties. The order granting injunctive relief was based solely on plaintiffs' breach of contract theory as it pertained to those persons in the class who had retired from either M-F or MCC, and those persons who were disabled.

As mentioned, following the Circuit Courts opinion in *Howe I*, an intense debate arose between the parties as to precisely what the Circuit Court had said. Defendants' position was that this case was over, that the Circuit Court had decided the merits and had foreclosed all possible grounds for recovery, and that it was error for this court to ignore the "law of the case." Defendants base their argument on the premise that the Circuit Court found that section 7.4 of the master plan (reservation of rights to terminate and amend), together with the past practice of the company clearly precludes a finding that retirees' rights to benefits vest for life on retirement and that therefore there are no issues left and the case is over because plaintiffs can not recover any benefits when the company never promised them for life.

Plaintiffs counter this argument by contending that the defendants' reading of *Howe I* reaches much further than the Circuit Court intended. Plaintiffs argue that because of the limited record before the Circuit Court on the injunction appeal the Circuit Court did not have enough before it to foreclose plaintiffs' theories of estoppel and fraud. Further, plaintiffs argue that the Circuit Court could not and did not address the issue of whether section 7.4 was disclosed adequately to the plaintiffs.

[5] This order as well as this court's Findings of Fact and Conclusions of Law order, filed in conjunction with this order of necessity have some overlap. The court has made findings of fact which are directly transferable to this order. The court, in these orders has responded to all issues raised in the parties post-trial motions. These pleadings cover some 562 pages of the court's file. In addition the court has reviewed the over 7,000 pages of trial and post-trial transcripts.

This court, after careful review of the Circuit Court's opinion and the parties' arguments, was also unable to ascertain precisely what the Circuit Court's holding in *Howe I* meant. As mentioned, in an effort to seek clarification of that order, this court granted defendants' motion for summary judgment as it pertained to retirees and certified the order allowing for an interlocutory appeal. That appeal was not accepted by the Circuit. Thereupon, this court rejected defendants "law of the case" argument that all the issues had been decided and embarked on a path which would allow both parties an opportunity to develop all the record they felt appropriate for appellate review. *See generally Builders Steel Co. v. Commissioner of Internal Rev.* 179 F.2d 377 (8th Cir. 1950).

In reaching this decision the court carefully reviewed *Continental Bank & Trust Co. v. American Bonding*, 630 F.2d 606, 608 (8th Cir. 1980) wherein the court stated:

> It is beyond cavil that the decision on former appeal is the "law of the case" on a question presented in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. * * *
>
> While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising on specific cases. (citations omitted).

Further, this court reviewed the following passages from *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697-98 (8th Cir. 1948):

> We recognize the established rule that, under an appeal from a decree for a preliminary injunction, the

appellate court ought not to determine crucial questions conditioning the merits of the case; (1) Because their adjudication of such questions ought not to be made until after the parties have had an opportunity to present their evidence and their arguments upon the entire proof; (2) because such an adjudication would not estop any of the parties in the subsequent trial of the issues of the case or otherwise; and (3) because such a decision would in many cases be made on a different state of facts and upon different arguments from those presented at the final hearing, and we neither decide nor intimate our opinion upon those questions.

* * *

The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for.

(citations omitted)

Accordingly, this court, ever mindful of *Howe I*, choose the course of trial and resolution of this matter, a choice which provided all parties their day in court. All arguments in relation to the law of the case are denied.

RIGHT TO JURY A TRIAL

This court, in its order of August 6, 1991, denied defendants' motion to strike plaintiffs' jury demand. This court proceeded to a jury trial on this matter wherein all issues were presented to a jury. As in other aspects of this trial, this decision sparked great debate between the parties. This court informed all counsel that it would submit this matter to the jury and treat all claims that were legal in nature as binding and those issues equitable in nature as advisory pursuant to F.R.Civ.P. 39(c). In accordance with this ruling the court today in a separate order also files it Findings of Fact and Conclusions of Law which includes the possibility of permanent injunctive relief if that is the choice of the plaintiffs.

The court has considered carefully the defendants' arguments opposing a jury trial and denies all motions based thereon. The court, in support of this ruling incorporates its previous order on this issue dated August 6, 1991.[6] Therefore, the court denies defendants' motion for a new trial based on this matter having been presented to a jury.

ALTER EGO

The court discusses all arguments in relation to the issue of alter ego in its order on Findings of Fact and Conclusions of Law pages 41-50 [80a-89a]. As noted in that order, all of defendants' motions in relation to the alter ego issue are denied.

JUDGMENT AS A MATTER OF LAW

Federal Rule of Civil Procedure 50 was amended on December 1, 1991, to change the name of a motion which previously had been called in part judgment notwithstanding the verdict to judgment as a matter of law. Rule 50(b) states:

> **Renewal of Motion for Judgment After Trial; Alternative for New Trial.** Whenever a motion for a judgment as a matter of law made at the close of all evidence

[6] The court, since its order of August 6, 1991, has become aware of the following cases supporting this court's position that the Seventh Amendment guaranties the right to a jury trial in ERISA cases: *International Union v. Midland Steel Prod.*, 771 F.Supp 860 (N.D. Ohio 1991); *McDonald v. Artcraft Elec. Supply Co.*, 774 F.Supp. 29 (D.D.C. 1991); *Steeples v. Time Ins. Co.*, 139 F.R.D. 688 (N.D. OK 1991); *Weber v. Jacobs MFG.Co.*, 751 F. Supp. 21 (D. Conn. 1990); *Resnick v. Resnick*, 763 F. Supp 760 (S.D.N.Y. 1991). In addition the following article is noted *The Right to Jury Trial in ERISA Civil Enforcement Actions*, 15 Am.J.Trial Advoc. 157 (1991).

The court is aware of the authority to the contrary, specifically *Kirk v. Provident Life & Accident Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991); *In Re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Bright v. Federated Mutual Ins. Co.*, No. 92-10499 (Nov. 10, 1992, S.D. Iowa) (Longstaff, J., noting this court's August 6, 1991 order, but following *Kirk* because claim involved was equitable in nature). As set out in the August 6, 1991 order, this court believes that *Vorpahl* and *Kirk* are limited to cases involving solely equitable or declaratory relief in light of the ruling in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

> is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * * A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

The court will now address those claims of the plaintiffs which are not equitable in nature and which were submitted to the jury for their determination.

BREACH OF CONTRACT—COUNT 1

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

The defendants argue that this count was dismissed in *Howe v. Varity*, 896 F.2d 1107 (8th Cir. 1990) ("*Howe I*"), which stated that "welfare benefit plans may be modified or terminated absent the employer's contractual agreement to the contrary." *Howe I*, 896 F.2d at 1109; *see also Anderson v. Alpha Portland Indus. Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987). The defendants argue further that Congress has explicitly exempted welfare benefits from ERISA's vesting provisions. *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 1675 (1989). Finally, they argue that the Eighth Circuit has held explicitly that benefits under an employee welfare benefit plan, unlike pension benefits, do not vest under ERISA and that "nothing in the terms of ERISA prevents the employer from changing an employee welfare benefit plan." *John Morrell*, 830 F.2d at 875-876 (citing *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("we discern no basis for finding mandatory vesting in ERISA of retiree welfare benefits")).

The issue then is "simply one of contract interpretation." *Howe I*, 896 F.2d at 1109 (quoting *Alpha Portland*, 836 F.2d at 1516). The defendants state that the "plaintiffs have the burden of proving vested welfare benefits," *Howe I*, 896 F.2d at 1107; *Alpha Portland*, 836 F.2d at 1517, whereby proving that the employer contractually agreed not to modify or terminate benefits. The proof of promise cannot be inferred, rather it must be an affirmative promise by the employer. *Alpha Portland*, 836 F.2d at 1517.

The defendants contend that all the plan documents were considered by the Circuit Court in *Howe I*, not just section 7.4 as argued by the plaintiffs. The defendants further argue that the Circuit Court then concluded as a matter of law, plaintiffs are not entitled to lifetime welfare benefits and found "[n]othing in the documents that establishes retirement as a vesting point." *Howe I*, 896 F.2d at 1110. The defendants also point out that the Circuit Court states that "section 7.4 of the plan does not itself pinpoint retirement as a vesting trigger." *Id.* at 1110.

The defendants claim that since plaintiffs cannot point to any language in the plan that promises benefits will "vest" at retirement, or that benefits would not be modified or terminated or that the benefits would be irrevocable, or that they would be "for life," the breach of contract claim should be dismissed. Defendants further argue that the MCC Retiree plan documents (which is the M-F plan) explicitly, unambiguously and clearly reserve a right to amend or terminate welfare benefits under section 7.4 of the Master Plan, which specifically provides that:

> The company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employees shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.

In addition, defendants argue that Section 8.1 of the Master Plan gives the Board of Directors of the Company, or the Executive Committee of the Board of Directors the power to amend or terminate the plan. Further, Appendix B to the Master Plan provided for medical, accident or other benefits, but these benefits, according to Section 7 of the Plan may be amended or terminated. Additionally, Appendix B(1) provided that welfare benefits for the employees (both active employees and retirees would cease automatically, upon termination of the Plan.

The defendants further contend that the Court of Appeals has held in *Howe I* that provisions that appeared in M-F Inc.'s benefit plan documents reserving the right to terminate or amend benefits override any promises of "lifetime" benefits. Defendants claim that the Circuit Court examined section 7.4 of the Master Plan and concluded that M-F Inc. had reserved the right to terminate or amend benefits and therefore any claim for breach of contract must fail.

Plaintiffs do not argue that ERISA includes a mandatory vesting requirement for welfare benefits, but they claim that parties may contract for vesting of welfare benefits. *John Morrell*, 830 F.2d at 876-877; *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988); *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986); *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812, 815 (8th Cir. 1988); *Jansen v. Greyhound Corp.*, 692 F.Supp. 1029, 1036 (N.D. Iowa 1987). Thus, when an employer promises to provide health benefits to its employees without advising them of grounds for termination of the plans, the employer has a contractual obligation under ERISA to provide the benefits. *Jansen*, 692 F.2d at 1037; *Connors Steel*, 855 F.2d at 1505; *White Farm*, 788 F.2d at 1191. These decisions, plaintiffs argue, rely on the fact that federal common law was created to govern obligations an employer owes its employees. *Franchise Tax Board v. Construction Laborers Vaction Trust*, 463 U.S. 1, 24, n.6 (1983). In this case, ordinary contract principles should be used to determine if benefits are vested. *DeGeare*, 837 F.2d at 815.

Plaintiffs finally argue that the defendants are equitably estopped from relying on section 7.4 to deny welfare benefits because they failed to include a termination provision in the summary plan description (SPD). Under ERISA, an employer must provide a summary plan description to participants which describes circumstances which may result in disqualification, ineligibility, or denial or loss of benefits, written in understandable form, which is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. *Arnold v. Arrow Transp. Co. of Delaware*, 926 F.2d 782, 785 (9th Cir. 1990). Employees are entitled to rely on descriptions contained in summary benefits plan descriptions required by ERISA. Poor drafting of summary benefit plan descriptions may extend or enlarge coverage which would otherwise be unavailable. *Branch v. G. Bernd Co.*, 764 F. Supp. 1527, 1538 (M.D. Ga. 1991).

When determining the duration of the plaintiffs' benefits, the court must begin by examining the language of the plan documents. *Id.* at 816; *Alpha Portland*, 836 F.2d at 1516. Each provision of the plan documents should be read consistently with all other provisions and as part of integrated whole. *DeGeare*, 836 F.2d at 816. If ambiguities exist, extrinsic evidence may be considered.

The court finds that defendants' motion for judgment as a matter of law on the breach of contract count should be granted. For plaintiffs to recover under this count they must show a contract for lifetime benefits which can not be terminated. They cannot make such a showing in the face of section 7.4. Plaintiffs' arguments relating to estoppel and failure to disclose adequately the reservation of rights provisions of the plan are best directed to other counts that are discussed in the court's Findings of Fact and Conclusions of Law order.[7]

---

[7] The court realizes that traditionally equitable estoppel is a defense, however given the emerging case law and the posture of this case the court concludes that it is appropriate to recognize equitable estoppel as an independent cause of action. *See Fitch v. Arkansas Blue Cross and Blue Shield*, 795 F.Supp. 904, 906-07 (W.D. Ark. 1992); *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285-86 (11th Cir. 1990), *cert denied*, __ U.S. __, 111 S.Ct. 675, 112 L.Ed.2d. 668 (1991).

Accordingly, defendants' motions for judgment as a matter of law on count 1 (breach of contract) is granted as it relates to claims made by the MCC-Retired Class and the Individual Plaintiffs. The claims of the MCC-Terminated Class will be discussed below.

MCC-TERMINATED Class

Defendants argue that the claims of the MCC Terminated Class must fail for the same reasons that the retirees claims failed, i.e., the lack of a contract on which an action for breach could be based. Defendants further argue that not only do plaintiffs confront a termination allowance policy which does not affirmatively promise vested termination benefits, but the policy expressly stated that it contained no contractual promise to provide termination allowances to employees. In support of their position defendants cite trial exhibit 7, which is PAM 5.01.01 (III)(B)[8] which states:

> The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

Defendants further argue that this class of plaintiffs were not even eligible for consideration for termination allowances. Defendants state that only an employee whose separation was classified as a "Termination-Release" was eligible for a termination allowance. PAM 5.01.01(III)(C). "Termination Release" is defined as situations where:

1. employee is putting forth his best effort, but cannot perform at an acceptable level in his present position;

[8] PAM is an acronym for Personnel Administration Manual.

2. employee not designated for layoff who refuses an offer of work which is considered unsuitable according to Section IV.A.4 of this procedure;
3. employee is habitually tardy or absent because of factors beyond his control;
4. employee is no longer performing at an acceptable level as a result of significant change in position requirements;
5. employee is separated as the result of the sale of a company-operated retail store and not reemployed by the successor store within thirty (30) days following the date of its transfer to the purchaser; or
6. other individual reasons consistent with this P.A.M. as approved by the Director of Personnel—Head Office.

PAM 3.05.01(V)(D), Ex. 6.

Plaintiffs, in support of their claim, argue that according to past company practice their claim would lie under item number 6 (above) "other individual reasons consistent with this P.A.M. as approved by the Director of Personnel—Head Office."

The court finds that the defendants clearly stated in trial exhibit 7, PAM 5.01.01 (III)(B), set out above on pages 14-15 of this order, that they are not creating a contractual relationship as to these benefits. Further, under the terms of the P.A.M. defendants reserved the right to administer the plan in their sole discretion and amend without prior notice. Therefore, the refusal to pay termination benefits to this subclass cannot form the grounds for a breach of contract claim. Accordingly, defendants motion for judgment as a matter of law as it relates to the MCC - Terminated Class is granted on the breach of contract claim (count 1).

BREACH OF FIDUCIARY DUTY—COUNT 2

The court's discussion on Count 2 can be found in the Court's order on Findings of Fact and Conclusions of law pages 50-63 [89a-97a]. As noted in that order, defendants'

motions in relation to breach of fiduciary duty are granted as against the MCC Terminated Class and denied as to the MCC Retired Class and the individual plaintiffs.

INTERFERENCE WITH PROTECTED RIGHTS—COUNT 3

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

ERISA § 510, 29 U.S.C. § 1140, makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan]." Participants and beneficiaries may sue for violations of this statute under 29 U.S.C. § 1132(a)(3).

Plaintiffs argue in support of their claim under § 1140 that the evidence supports the jury's finding that defendants compelling motive for creating MCC and transferring plaintiffs to MCC was to rid themselves of an enormous debt, including the cost of benefits plaintiffs would have received at retirement or termination. Plaintiffs also allege that defendants accomplished this task by *ensuring* that all the Combines and Related Equipment ("CARE") Division employees would transfer to MCC by assuring them that their benefits would be unchanged. As a result, plaintiffs claim that defendants interfered with their protected rights by coercing them to transfer to MCC by making statements that later proved to be false.

Defendants argue in support of their motion to defeat this claim that because the Eighth Circuit ruled in *Howe I* that plaintiffs' right to benefits had not vested, the "protected rights" could not have been "interfered" with. *See Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, 723 (N.D. Ala. 1985), *aff'd.*, 799 F.2d 1464, 1471 (11th Cir. 1986). Defendants also believe that the transfer of the combines division and its employees to MCC does not implicate 29 U.S.C. § 1140 because section 1140 was not intended to prohibit the sale of businesses. *Phillips*, 614 F.Supp. at 721-724.

In response, plaintiffs argue that the Eighth Circuit's ruling in *Howe I* did not determine whether defendants interfered with plaintiffs' protected rights. They claim that the statute (section 1140) explicitly states that it is "unlawful" for any person to interfere with "the attainment of any right" under the plan. *Vogel v. Independence Federal Savings Bank*, 692 F.Supp. 587, 593 (D. Md. 1988).

To establish a claim for interference with protected rights, plaintiffs must prove:

a. Prohibited conduct;

b. Taken for the purpose of interfering;

c. With the attainment of any right to which the plaintiffs may have become entitled under the plan.

See Adams v. LTV Steel Mining Co., 936 F.2d 368, 370 (8th Cir. 1991); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987). Conduct made actionable by this statute is any adverse employment action taken for the prohibited purpose, and includes any scheme to prevent employees from attaining eligibility for benefits protected by ERISA. *See Gavalik*, 812 F.2d at 854-57 ("liability avoidance scheme"). Plaintiffs must prove the defendant's specific intent to engage in proscribed activity, but the desire to avoid ERISA obligations need not be proven to be the sole motivating factor in the defendants' conduct. *Id.* at 851-52.

An employer may be held liable for a violation of § 1140. ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). This court has determined that defendants were plaintiffs' employer either directly or alter egos of MCC when the alleged violations of § 1140 occurred.[9] Implementation of a scheme of employment transfers, terminations or layoffs that is motivated by the desire to prevent employees from attaining rights under an employee benefit plan is conduct

[9] See this court's order on Findings of Fact and Conclusions of Law pages 41-50 [80a-89a].

actionable under this section. *See Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987). Using misinformation to entice a participant or beneficiary to take actions affecting his employment status and corresponding benefit entitlements is conduct actionable under this section. *See Greenblatt v. Budd Co.*, 666 F. Supp. 735, 740 (E.D. Pa. 1987) (harassment intended to force employee to retire is actionable under § 1140). Remedies available for violation of 29 U.S.C. § 1140 include payment for lost benefits and any other equitable relief necessary to make the plaintiff whole. *See, e.g., Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015-20 (W.D. Mo. 1984); and *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534, 536 (E.D. Wis. 1980).

Applying these standards to the case at bar, the court concludes that Project Sunshine was a scheme designed, in part, to prevent employees of M-F from attaining rights to which they would have become entitled if they had retired under the M-F Plan.[10] Defendants violated § 1140 with respect to the MCC-Retired Class when, in order to persuade them to transfer to MCC, defendants deliberately misinformed them or knowingly failed to inform them about several aspects of the proposed transfer, to-wit:

(1) MCC's prospects of viability.

(2) Benefits would not change.

(3) Right to take early retirement from M-F before being transferred to MCC.

(4) Right to severance pay from M-F in the event they refused the transfer to MCC.

(5) The effect a receivership of MCC would have on their benefits.

One of the facts motivating defendants to misinform or fail to inform the members of the Retired subclass was defendants'

[10] This court discusses fully all aspects of M-F and Varity debt reduction plan, Project Sunshine, in this court's order on Findings of Fact and Conclusions of Law at pages 7-14 [53a-58a] and pages 41-50 [80a-89a].

desire to avoid liability for health and welfare benefits to those plaintiff class members under the M-F Plan.

The court concludes that defendants' conduct toward plaintiffs constituted discrimination prohibited by 29 U.S.C. § 1140. The MCC-Retired Class is therefore entitled to recover compensatory damages for past unpaid benefits, and to compensatory damages for future benefits or to injunctive relief in placing them back on the M-F plan under 29 U.S.C. § 1132(a)(3), however they may so elect. Accordingly, defendants' motions in relation to these plaintiffs are denied.

MCC-TERMINATED CLASS

Plaintiffs' claims for relief as to this subclass mirror those of the MCC-Retired and Individual Plaintiffs' claims listed and discussed above. In turn, defendants' motion for judgment as a matter of law also mirrors their arguments above.

Under the mandate of *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113-15 (1989), this court finds that because of the defendants' reservation of the right to interpret this plan, the standard of review here is not de novo but an arbitrary and capricious standard. When viewed as a whole, M-F's termination—severance pay plan did not create any reasonable expectations in the MCC-Terminated Class.

This finding is supported in light of sections 3.05 and 5.01 of the Personnel Administration Manual ("PAM") Exs. 6, 7) constitute employee welfare benefit plan documents within the meaning of ERISA which governed the provision, level, extent and duration of severance benefits. Section 3.05 of the PAM describes six situations as set out in full on pages 16-17 [36a-37a] above. Persons included under the types of situations set out in 3.05 of the P.A.M. are eligible for termination allowance.

Section 5.01 of the PAM provides:

III. *GENERAL*

A. It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

1. This practice does not apply to salaried employees—

a. with less than three months' continuous service;

b. hired as Limited Service Employees (casual—temporary); or

c. hired under the Cooperative Education Student Program.

B. The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

C. Eligibility for termination allowance is based upon the separation classification as outlined in P.A.M. 3.05.01, Separations—Salaried Employees.

1. An employee will not be eligible for termination allowance if the separation is classified as any of the following:

a. "Quit"
b. "Discharge"
c. "Layoff"
d. "Retirement, Death or Disability"
e. "Termination—Unsatisfactory"
f. "Assignment Completed"

2. An employee whose separation is classified as "Termination—Release" will be eligible for termination allowance.

G. *Approval Procedure*

1. The manager of the terminated employee will initiate termination action in accordance with PAM 3.05.01,

Separations—Salaried Employees. Recommendations regarding termination allowance will be noted in a separate memo. The initiating manager will make only recommendations; he or she will not calculate the actual amount of termination allowance. No commitment is to be made to the employee until notice has been received that the allowance has been authorized.

2. Upon receipt of the Employee Profile and accompanying memo, Personnel Administration Department will review the recommendations and details regarding the termination. Any termination allowance must be approved by Personnel Administration Department. Recommendations are to be based only on the reasons outlined on the Employee Profile. Therefore, it is important that concise and accurate explanations be given to the employee and be provided on the Employee Profile (Form MF-4197).

The plan language above clearly states that "an employee will not be eligible for termination allowance if the separation is classified as any of the following: quit, discharge, layoff, retirement, death or disability, termination - unsatisfactory, assignment completed". The evidence is clear, without the transfer to MCC, employment conditions at M-F for this subclass were going to change because the entire combine industry was in dire straits. Under the factors listed above, this subclass of plaintiffs (MCC-Terminated consisting of @ 140 persons) are unable to state a successful claim for interference with any protected right. The motions of the defendants are sustained as to this subclass.

ESTOPPEL—COUNT 4

The court's discussion on Count 4 can be found in the Court's order on Findings of Fact and Conclusions of law pages 63-78 [100a-112a], wherein the court found that the M-F Retired Individual Plaintiffs and MCC Retired Class were entitled to relief and the MCC Terminated Class were not entitled to relief on the estoppel claim.

FRAUDULENT MISREPRESENTATION—COUNT 5

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

MCC-TERMINATED CLASS

Plaintiffs argue, under this claim, that the evidence shows that defendants made numerous material misrepresentations and omissions in inducing plaintiffs to transfer to MCC. As noted previously, defendants: (a) assured plaintiffs that their benefits would be unchanged if they accepted employment with MCC; (b) failed to disclose MCC's unstable financial condition and poor prospects for survival; (c) failed to disclose the effects of MCC's probable bankruptcy, insolvency or receivership would have on the welfare benefits of MCC employees; and (d) failed to inform employees as required by ERISA in the benefits booklet given to them entitled *You and M-F*, that the company reserved the right to amend or terminate the welfare benefit plan. The evidence at trial further demonstrated that when defendants made the material misrepresentation and omissions, their primary purpose was to induce the plaintiffs into accepting the transfer to MCC.

Defendants again allege that, in *Howe I*, the Eighth Circuit reviewed the documents and found no representation promising plaintiffs lifetime welfare benefits. Defendants also claim that the Eighth Circuit held that defendants made no promises not to amend or terminate the plan and therefore there is no basis for plaintiffs' fraudulent misrepresentation claim. Defendants further argue that any claim for fraudulent misrepresentation is not cognizable under ERISA. After extensive research the court agrees with defendants that any claim for fraudulent misrepresentation is preempted by ERISA. *See Consolidated Beef Indus., Inc. New York Life Ins. Co.*, 949 F.2d 960,964 (8th Cir. 1991); *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791, 793-94 (11th Cir. 1989); *Paul Revere Life Insurance Co. v. Vandenplas*, Civ. Nos. 3-91-547, 721, 1992 WL 320994 at p.4 (D.MN Oct. 27, 1992).

Although the cases cited above are not factually "on all fours" with the situation presented here, the following case is

fairly close. In concluding that claims based on fraud were preempted, the Fifth Circuit, in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218 (5th Cir. 1992), stated:

> This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. Du-Pont de Nemours and Co.*, 894 F.2d 755 (5th Cir. 1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a).

The weight of authority is against the plaintiffs. Accordingly, any claim for relief under this theory must fail, and defendants' motion for judgment as a matter of law is granted on count 5, fraudulent misrepresentation.

PUNITIVE DAMAGES

The court discusses plaintiffs' claim for punitive damages in its order on Findings of Fact and Conclusions of Law pages 78-79 [113a], wherein the court found punitive damages were not appropriate in light of *Novak v. Anderson Corp.*, 962 F.2d 757 (8th Cir. 1992).

MOTION FOR NEW TRIAL.

Federal Rule of Civil Procedure 59, in pertinent part provides that:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

This court, in reviewing a motion for new trial, is not required to view the evidence in the light most favorable to the nonmovant; rather, it may weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. *Quachita National Bank v. Posco Corp.*, 686 F.2d 1291 (8th Cir. 1982). The authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). A motion for new trial should be granted when the moving party has met his burden of showing either that prejudicial error has been committed or substantial justice has not been achieved. *Mid Continent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973).

All other points and issues raised by defendants in their motions and in their 171 page brief in support thereof, not mentioned herein or in this court's Findings of Fact and Conclusions of Law order, have been considered and are hereby denied. Defendants' shotgun approach to these motions does not obligate this court to respond to each and every point raised. The court has, however, reviewed each and every point raised by defendants and finds those not discussed above or in this court's order on Findings of Fact and Conclusions of Law are hereby denied.

THEREFORE IT IS HEREBY ORDERED that defendants' motion for judgment as a matter of law setting aside plaintiffs' breach of contract jury verdict (count 1) is granted as against all plaintiffs.

IT IS FURTHER ORDERED that defendants' motion for judgment as a matter of law on plaintiffs' interference with protected rights claims (count 3) is denied as to the claims of the MCC-Retired Class and the Individual Plaintiffs. Defendants' motion on said claim is granted as to the claims of the MCC-Terminated Class.

IT IS FURTHER ORDERED that defendants' motion for judgment as a matter of law setting aside plaintiffs' fraudulent

misrepresentation jury verdict (count 5) claim is granted against all plaintiffs.

IT IS FURTHER ORDERED that motion for judgment as a matter of law as to punitive damages is granted and the jury's award of punitive damages is set aside.

IT IS FURTHER ORDERED that plaintiffs' shall make an election on damages within 20 days of the date of this order. Plaintiffs' can either accept the relief granted in this court's Order on Findings of Fact and Conclusion of Law which includes injunctive relief and actual damages or accept the jury's award on the claims listed above with the relief granted, as set out below:

1. MCC Retired Class $7,600,000 for damages past and future.

2. The ten individual plaintiffs for damages past and future:

John Altomare	$ 80,000
Charles Barron	$ 72,000
Alexander Charron	$ 48,554
Charlotte Chiles	$ 45,000
Anita Crowe	$ 49,013
Ray Darr	$ 100,000
Doris Guidicessi	$ 50,000
Barnett Lucas	$ 100,810
Robert Skromme	$ 74,955
Estate of Walter Smith	$ 92,000
Total	$ 712,332

March 26, 1993

/s/ DONALD E. O'BRIEN
DONALD E. O'BRIEN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4-88-CV-1598

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON INC.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs sued to recover benefits pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 § 1001, *et seq.*, as well as several related federal common law doctrines. Jurisdiction in this court is founded on 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331.

This court has on this date entered another order in relation to the post trial motions pertaining to the jury verdicts. This order covers all issues, both those decided by the jury and those decided by the court, to establish a better record in the

event the Circuit Court finds that submission to a jury was inappropriate.

In this Order, the court has, in summary:

1. Ruled that the MCC Retired Class and the individual plaintiffs should prevail on their claims of equitable estoppel and breach of fiduciary duty and that the jury verdicts on these claims shall stand as relates to them.
2. Ruled that these plaintiffs shall make an election of remedies.
3. Set aside the jury verdicts for the MCC Terminated Class on all of its claims.

BACKGROUND and PROCEDURAL HISTORY

There are ten individual plaintiffs. The court ruled on June 4, 1991, that these individuals could not proceed as a class action. These plaintiffs will hereinafter be referred to as the "Individual Plaintiffs."

Also on June 4, 1991, the court ordered, pursuant to Fed. R. Civ. P. 23(c)(4), that two subclasses of plaintiffs be created and proceed as class actions. The first class consists of eighty-three plaintiffs who worked for Massey-Ferguson, Inc. ("M-F") before May 9, 1986. These plaintiffs were thereafter "transferred" to Massey Combines Corporation ("MCC") and retired before March 4, 1988, when MCC went into receivership (bankruptcy) in Canada. This class shall hereinafter be referred to as the "MCC-Retired Class." The second class is comprised of one hundred forty plaintiffs who worked for M-F before May 9, 1986. These plaintiffs were also thereafter "transferred" to MCC. They were still employed on March 4, 1988. This class shall hereinafter be referred to as the "MCC-Terminated Class."

Defendants are M-F and Varity Corporation ("Varity"), which formerly was known as Massey-Ferguson Ltd.

The court entered a preliminary injunction on July 14, 1989. That injunction was modified by the Eighth Circuit Court of Appeals in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990). (*Howe I*) The case returned for further proceedings, which included the addition of new parties, substantial discovery, significant pleading amendments, numerous pre-trial motions, and unsuccessful attempted appeals by plaintiffs and defendants.

The case was tried before this court to a jury from August 26 until September 20, 1991. Defendants have throughout this proceeding maintained plaintiffs do not have a right to a jury trial. The court disagreed with defendants and on August 9, 1991, denied their motion to strike plaintiffs' jury demand.

The court now enters the following findings of fact and conclusions of law as would be required by Fed. R. Civ. P. 52 on those claims which are equitable in nature and treated as advisory under Fed. R. Civ. P. 39(c). These findings and conclusions are also necessary to resolve plaintiffs' requests for injunctive relief. If the Circuit Court decides the jury trial procedure was incorrect, this court anticipates the Circuit Court will proceed to review these findings and conclusions without the necessity of a remand. *See generally Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943); *Cuddy v. Carmen*, 694 F.2d 853, 859-60 (D.C. Cir. 1982); *McKinney v. Gannett Co.*, 660 F. Supp. 984, 991-92 (D.N. Mex. 1981); Fed. R. Civ. P. 52, 39(c); 11 Wright & Miller, *Federal Practice and Procedure* § 2887, pp. 296-97 (1973).

FINDINGS OF FACT

1. M-F is a Maryland corporation, a wholly-owned subsidiary, and it sold and distributed certain products manufactured by subsidiaries of Varity. It sells farm implements and related parts. M-F's principal place of business is in Des Moines, Iowa. Varity is a publicly-owned holding company and at all materials times had its worldwide headquarters in Toronto, Ontario, Canada. Varity controlled the activities of M-F at all relevant times.

2. M-F has for many years provided its employees and retirees basic health, major medical, life insurance, vision care, hearing care, and dental benefits under an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3). These benefits are hereinafter collectively called "welfare benefits." The M-F plan was still in existence at the time of trial. It has never been amended or terminated by M-F or Varity in a manner eliminating welfare benefits. There are *no* pension benefit claims in this case.

3. These employee welfare plans at all relevant times were self-insured and administered through John Hancock.

4. These plaintiffs, while employed at M-F and Massey Combines Corporation ("MCC") were not a member of a union and were considered management "at will" salaried employees and were not covered by any collective bargaining agreement or other employment contract of any kind.

5. M-F has for many years also paid severance pay to terminated employees pursuant to a policy contained in its Personal Administration Manual ("PAM"). This policy is an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3).

6. The Individual Plaintiffs' names, the number of years each worked for M-F, and the month and year they retired are as follows: John Altomare, twenty-one years, March 1983; Charles Barron, sixteen years, January 1986; Alexander Charron, twenty-four years, May 1983; Charlotte Chiles, ten years, February 1986; Anita Crowe, thirteen years, April 1986; Ray Darr, fourteen years, December 1986; Doris Guidicessi, seventeen years, February 1986; Barnett Lucas, twenty-three years, March 1985; Robert Skromme, eighteen years, February 1982; and Estate of Walter Smith, represented by his surviving spouse Vera Smith, twenty-four years, November 1985.

7. The Individual Plaintiffs worked for and retired from M-F, not MCC. None of the Individual Plaintiffs ever worked for MCC, except Anita Crowe, who came back from her M-F retirement to perform a one-time project for MCC. None of the Individual Plaintiffs authorized a transfer of the obligation

to pay welfare benefits from M-F to MCC. Defendants did not seek permission from any of the Individual Plaintiffs before attempting to transfer the obligation to pay welfare benefits from M-F to MCC. Each of the Individual Plaintiffs understood that M-F welfare benefits were to continue for life after retirement.

8. Charles Howe and Ralph Thompson are the class representatives for the MCC-Retired Class. They worked for M-F for 23 and 29 years respectively. Both "transferred" to MCC after May 9, 1986. They retired as salaried employees in December and June 1987 respectively. Each understood that employee welfare benefits would continue throughout their life or the life of their spouse, whichever was longer.

9. Patrick Mousel and Robert Wells are the class representatives for the MCC-Terminated Class. They worked for M-F for fourteen and twenty-seven years, respectively. After May 9, 1986, they "transferred" to MCC and they were employed as salaried employees on March 4, 1988. Both understood that persons terminated from either M-F or MCC for reasons beyond their control would receive a termination allowance (severance pay).

10. On March 4, 1988, MCC went into receivership (bankruptcy) in Canada. As a result, the individual Plaintiffs and the members of the Retired Class stopped receiving welfare benefits and the members of the Terminated Class lost their employment without termination pay. Varity and M-F maintain that only MCC was obligated to provide the welfare benefits to plaintiffs.

11. Varity began in the early 1980s to reorganize its operating entities along product as opposed to geographic lines. (Tr. 2254.) The Combines and Related Equipment ("CARE") Division and the Tractor Division were created in 1984 as part of this "divisionalization" process. (Tr. 2254, 2255.) The CARE Division manufactured and/or marketed the following products: combines, four-wheel drive tractors, wide-level disc harrows, balers, swathers and certain parts. (Tr. 614, 1304.) After the CARE Division was created none of these products

could be sold for a profit because of the distressed market conditions, except balers. A part of Project Sunshine[1] required MCC to sell the balers exclusively to M-F who in turn sold them for a profit. (Tr. 617, 741-47.)

12. Starting in 1982, there began an unprecedented decline in the sales of combine harvesters in North America, caused in significant part by an extreme depression in this country's agricultural economy. (Ex. 536(i).)

13. The CARE Division, which never was profitable, was a significant economic drag on Varity. (Tr. 617, 1304, 2948.) During the fiscal year ending January 31, 1985, the CARE Division lost $53.4 million, while other Varity divisions and subsidiaries earned $55.6 million. (Ex. 265E; Tr. 2933.) During the first three quarters of 1985 the CARE Division lost $35.4 million. Exs. 265E, 315; Tr. 2934-35.)

14. Varity's financial position in early 1985 was very precarious. (Tr. 3744.) The CARE Division's large losses threatened to break Varity's debt covenants. (Tr. 3799.) However, other segments of Varity's operations were profitable.

15. The losses incurred by the CARE Division led Varity in 1985 to consider company-wide financial restructuring, an essential part of which was spinning off the CARE Division into a privately-held Canadian corporation under Varity's control. (Ex. 23, p. 17; Tr. 2211.) That corporation ultimately became MCC. Varity named this project "Project Sunshine." (Tr. 2212.) Varity's goals for Project Sunshine were to reduce its debt burden to a manageable level (Ex. 274, p. 188), to restore financial stability to Varity, and to "protect and insulate" itself from further deterioration of the combines business. (Ex. 61; Tr. 736.)

16. The cornerstone of Project Sunshine was Varity's deconsolidation of its CARE Division to avoid showing on Varity's financial statements the large losses associated with that division. (Tr. 2265.) Varity achieved this goal by spinning off the CARE Division into MCC. (Ex. 316.)

---

[1] Project Sunshine is discussed in detail in paragraphs 15-24 of this order.

17. In order to implement Project Sunshine, Varity could not create MCC unless the new company had some employees transferred to it. Furthermore, Varity wanted to rid itself of substantial obligations for employee benefits due or to become due both then working and retired employees. Defendants maintain that all plaintiffs resigned or were terminated from M-F and were hired by MCC as part of Project Sunshine.

18. Varity's financial statements were enhanced significantly by ridding itself of the CARE Division. (Tr. 809.) Making November 2, 1985 the effective date of Project Sunshine, even though the documents were not signed until May 9, 1986, enabled Varity to avoid showing approximately $54 million in fourth quarter losses associated with the combines business. Varity wanted to avoid showing this loss because it feared the reactions of creditors and investors. (Ex. 316, p. 8.)

19. The formation of a new company (MCC) in 1986 to manufacture and sell self-propelled combines and the four-wheel drive tractors was ill-conceived because of severe industry problems. (Tr. 2618.) The entire industry had experienced severe declines in both of these product lines throughout the 1980s. (Ex. 262.) The year 1986 was the all-time low for the industry sales of self-propelled combines. (Exs. 262, 536(i); Tr. 2622.) Varity was the only farm machinery manufacturer that deconsolidated its combines business during the 1980s. (Tr. 1264, 2651.)

20. Prior to May 9, 1986, Ivan Porter had worked for Varity or one of its wholly-owned subsidiaries for many years as a vice president, controller of its world-wide operations, and president of its CARE Division. (Tr. 1952.) Varity, by actions of its Chair and Chief Executive Officer Victor Rice, assigned ("seconded") Porter to the new MCC as its president and chief executive officer with the intent that he would return to Varity after two years. (Tr. 1957, 1961.) Porter remained an employee of Varity while working with MCC. (Ex. 36; Tr. 4367.) No other MCC employee and only a select few Varity employees knew of this arrangement. Varity provided

Porter a written indemnity agreement for his work with MCC. (Exs. 88, 89.) Varity originally promised Porter a $150,000 bonus if he returned to Varity after two years. (Ex. 36; Tr. 2219, 2250.) After Porter was asked to stay with MCC beyond two years, Varity increased the bonus to $250,000. (Tr. 2221, 2250.) Varity paid the $250,000 bonus to Porter after MCC went into receivership even though he did not return to Varity. (Exs. 36, 51, 80, 104.) Rice arranged Porter's severance package from Varity, not MCC, after MCC's receivership. (Ex. 104.)

21. While he was president and CEO of MCC, Porter retained an interest-free housing loan with Varity. (Tr. 1974.) He was granted an option to purchase 200,000 shares of Varity stock (which he exercised in 1988). (EX. 51; Tr. 1971.) He also remained in Varity's pension plan, stock option plan, and benefit plan, which provided his health and medical benefits and life insurance coverage. (Exs. 36, 51, 80, 104; Tr. 4151.)

22. Porter believed MCC had to participate in Project Sunshine for the best interests of Varity. (Ex. 155.) Porter received a $19,800 bonus from Varity after the Project Sunshine documents were signed on May 9, 1986. (Tr. 1997.)

23. Varity retained William Zinkewich (MCC's chief financial officer) and Tony Colvin (an MCC vice president) on its retirement plan for senior executives and provided life insurance coverage at Varity's senior executive levels. (Tr. 1979.) Varity indemnified Zinkewich for his work with MCC. (Tr. 1989, 4048, 4152.) Varity "rehired" Zinkewich within six months of the MCC receivership. (Tr. 4761.)

24. Despite financial statements indicating that MCC had an initial net worth of approximately $110 million, MCC was essentially bankrupt from the outset. (Exs. 264B, 312; Tr. 2912, 2916.) The fair market value of the MCC common stock was zero or nominal. (Ex. 264B; Tr. 2903.) As of May 9, 1986, MCC had incurred on its books approximately $54 million in losses even though it had not been in operation. (Ex. 312; Tr. 2909.) Inventory, receivables, and other assets that were transferred to MCC were overvalued by $46

million. (Ex. 313; Tr. 2913-14.) Rationalization and restructuring costs were underestimated. (Tr. 2913.) As a result of Project Sunshine, MCC incurred one-time costs of $24.2 million. Similarly, MCC's liabilities, including unrecorded pension liabilities, were underestimated. In sum, MCC had a negative net worth on the day it was created (May 9, 1986), with liabilities exceeding assets by at least $46 million. (Ex. 315; Tr. 2915-16, 2920.) MCC started on May 9, 1986, with only $15,000 cash. It immediately drew on a line of credit and began liquidating assets to generate cash. (Tr. 780.) MCC had little or no chance of survival from its onset. (Ex. 269B; Tr. 2493, 2618-19, 2925, 2952.)

25. As of May 9, 1986, the day of its creation, it was questionable whether MCC was a going concern. (Ex. 269B.) It was always unlikely that MCC was going to generate sufficient cash flow from manufacturing operations to pay off its debts and obligations. Although there were plans to produce combines in the future, the essence of the MCC business plan was liquidation of assets. (Tr. 2923.)

26. In the first month of MCC's existence, MCC executives, including Porter, openly discussed among themselves that MCC could not survive. The expression they used was, "that dog won't hunt." (Tr. 802-03.) All of MCC's officers, including Porter, agreed that MCC's chances of survival were not good. (Tr. 803-04.)

27. During its first year of existence, MCC lost approximately $88 million (as of January 31, 1987). During the first quarter of 1987 (February 1 to April 30), MCC lost $15 million dollars. MCC predicted a loss of $54 million dollars for the remaining three quarters of 1987 (May 1 through January 31, 1988). (Ex. 132; Tr. 4869-74.)

28. L. W. Templeton gave unchallenged testimony that Rice, Varity's Chairman and Chief Executive Officer, bragged to his peers that he had "unloaded his losers ail in one wagon" through Project Sunshine. (Tr. 2652.) Templeton testified that Rice said he was "putting his big product losers, combines and four-wheel drives in [MCC]. He told us he was putting

his big losers, company stores in [MCC] and told us he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations. Oh, yeah. He also told us that he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." (Tr. 2651-52.)

29. MCC assumed $282.4 (Canadian) million of long-term debt from Varity and M-F for inadequate consideration. (Tr. 752, 2030, 4863.)

30. Defendants "transferred" to MCC the obligation to provide welfare benefits for approximately 4,000 retirees, as well as the obligation to pay welfare benefits for the 1,500 CARE Division active employees. (Tr. 2001, 4932.) John Ruth, former president of M-F, testified the transfer "was absolutely cutting the throats for those 4,000 they allowed to go down the drain."[2] (Tr. 1512.) All of the retirees had worked for M-F, not MCC. The annual savings to defendants was in the millions of dollars. (Tr. 753-54.) These obligations were MCC's largest fixed costs. (Tr. 2061, 4934-35.) Defendants acknowledged in internal correspondence that it was in their best interest to have all the employees accept the transfer. (Ex. 47.)

31. Historically, M-F retail stores were a part of the Tractor Division, not the CARE Division. Nevertheless, they were transferred to MCC as a part of Project Sunshine because in 1984 and 1985 the stores were losing approximately $6 million a year. (Tr. 626-27, 647.) In order to avoid taking an accounting loss themselves, defendants forced MCC to take retail inventory that MCC did not want. (Ex. 155; Tr. 711-13, 727.) The inventory in the retail stores was transferred to MCC at book value. (Tr. 715-16.) The book value of the inventory was twenty to forty percent greater than the market value. (Tr. 711, 729.) Porter, the CEO for MCC, stated at the time of MCC's formation that the retail stores were "encumbered with this unwanted overvalued inventory," most of the

[2] Mr. Ruth is referring to retirees.

equipment was "junk," and important to "nurse our way through the problem in the best interest of M-F Limited [Varity]." (Ex. 155; Tr. 1361-62.) Porter viewed the retail stores as working "for nothing." (Ex. 155.)

32. Defendants required MCC to secure approval of M-F before MCC could sell equipment at below book value. (Tr. 719-20.) Reserves established (money supposedly set aside) by Varity to cover MCC's losses on transferred inventory sold below book value were not always paid promptly to MCC, causing cash flow problems. (Tr. 733.)

33. Prior to Project Sunshine, the parts business was part of the CARE Division. The defendants did not transfer the lucrative parts business from the CARE Division to MCC. (Tr. 734.) The parts business was very profitable, with a gross margin of fifty-two to fifty-five percent. (Tr. 748.) The absence of a parts business adversely affected MCC's cash flow, profit, and ability to supply MCC dealers with repair parts. (Tr. 749.)

34. Real estate located in Toronto, Ontario, Canada (called the King Street property) was valued in the millions of dollars and was a part of the CARE Division. However, this property was not transferred to MCC as a part of Project Sunshine. (Tr. 734-35, 749-50.)

35. After May 9, 1986, MCC was a private Canadian stock company, owned 45% by Varity, 35% by the Canadian Imperial Bank of Commerce, and 20% by the Canadian government. The Canadian Imperial Bank of Commerce and the Canadian government obtained their MCC stock in consideration of forbearance on loans to Varity as part of the debt restructuring of Varity accomplished through Project Sunshine. No new money was paid or loaned as part of the stock transactions. (Tr. 2020.)

36. MCC manufactured relatively few rotary combines during its existence. (60 Model 8560 in August 1986, 110 Model 8590 and 71 Model 8560 in March and April of 1987) (Ex. 575(k) at 3, Tr. 4214.)

37. Prior to May 9, 1986, MCC was owned completely by Varity and MCC's board of directors was comprised entirely of Varity employees. Varity employees created and executed all relevant Project Sunshine agreements for MCC. For example, Varity's in-house legal counsel, Robert Garland, signed the service agreements on behalf of both Varity and MCC and no independent counsel reviewed the documents for MCC. (Exs. 121, 122, 125, 140; Tr. 2379-81.) Also, M-F's in-house legal counsel, Ed Ludlow, signed the assignment and assumption agreement on behalf of both M-F and MCC without independent review for MCC. (Ex. 171.; Tr. 2382-84.) Defendants admitted MCC was not independent when the Project Sunshine documents were finalized. (Tr. 2248, 2264.)

38. After May 9, 1986, MCC had a five-member board. Varity, not MCC, indemnified the members of the MCC board. (Tr. 2224.) Varity's president, Vincent Laurenzo, was the chairman of MCC's board. Varity's senior vice president of finance and the director of Project Sunshine, Neil Arnold, was a member of MCC's board. Two seats were filled by a representative from the Canadian Imperial Bank of Commerce, Varity's largest lender, and a representative of the Canadian government. The fifth seat was filled by an employee of Wood Gundy, a Canadian investment bank, that did work for Varity and represented Varity during Project Sunshine. (Tr. 3836.) No officers of MCC were ever on its board. (Tr. 643, 4017.)

39. The CARE Division employees were referred to as MCC's employees after May 9, 1986. However, the employees who were transferred retained their M-F employee numbers. (Tr. 4724.) MCC and M-F shared the same physical location that had been and was at all relevant times M-F's United States headquarters. During the time MCC was sharing facilities with M-F, only the M-F name appeared on the building's marquee. (Tr. 762.) In addition, only the Massey-Ferguson name appeared on MCC's manufacturing facility in Brantford, Ontario, Canada. (Tr. 2050-51.) MCC and M-F had a common receptionist and telephone number, which was

answered "Massey-Ferguson." MCC began business using M-F's stationery. (Tr. 762-63.) With a few exceptions, MCC's products were sold by M-F dealers. The dealers maintained the existing "Massey-Ferguson" signs. "Massey" or "Massey-Ferguson" was the name on the combines sold by MCC. (Tr. 765-67.) MCC was totally dependent on the market goodwill of defendants. (Tr. 1496-97.)

40. MCC kept much of its insurance under the defendants' group policies. (Tr. 4877.)

41. Varity established an Operations Review Committee ("ORC") to monitor, review, and issue directives regarding the budget, expenditures, plans, policy, and performance of MCC. (Ex. 155; Tr. 707-08, 710, 797-98.) Rice, Varity's Chairman and Chief Executive Officer, and Laurenzo, Varity's President, both served on the ORC. (Tr. 2216.) Rice and Laurenzo hand-picked the other members of the ORC, all of whom were Varity employees. (Tr. 2392.) The ORC reviewed matters related to MCC's operations before those matters were presented to the MCC board. (Tr. 2264.)

42. Laurenzo met with Porter approximately twice a month during MCC's existence to discuss MCC operations. (Tr. 2259-60.) Porter consulted with Laurenzo in setting Richard Brown's salary as Vice-President of MCC. (Tr. 755-56.) Porter and Laurenzo also set criteria for paying bonuses to MCC executives. (Tr. 757-58.) Laurenzo was personally involved in the revision of MCC's business action plans. (Tr. 2261-62.)

43. MCC had a "cash management committee" comprised of Porter, Zinkewich, and Gary Stewart. This committee controlled all expenditures of cash by MCC. Stewart, who was MCC's treasurer, went to work for M-F prior to MCC's receivership.

44. At the insistence of Varity, MCC included in its budget unrealistic sales projections to match Varity projections upon which lenders relied in assessing the viability of Project Sunshine. (Exs. 67, 136; Tr. 787-89.)

45. Varity retained for two years the obligation to make up for shortfalls, up to $25 million, in MCC Canadian pension obligations.

46. Varity provided numerous services to MCC, including parts, warehousing, computer processing, management services, facilities, legal services, marketing, payroll services, and employee benefits services. (Tr. 2263-64, 2320-21.) Varity billed MCC for the services, but MCC did not always pay. (Tr. 2320.) At the time of the receivership, MCC owed Varity $6-7 million dollars in unpaid bills for services. (Tr. 4249, 4854.)

47. Ludlow (M-F) and his staff provided legal services to MCC. (Tr. 2370.) Garland (Varity) also provided legal services to MCC. (Tr. 2371.) MCC never had anyone on its own payroll who provided legal services. (Tr. 2371.)

48. Varity or one of its subsidiaries paid MCC officers during 1986. (Tr. 2258-59.) Varity still issued MCC—Vice President Brown's monthly paycheck until about mid-1987. (Tr. 756.)

49. Varity and MCC used the same benefit consultants. (Tr. 4901-02.) The benefit plan used by the defendants and MCC was administered by the same human resources department. All employees relied upon the same summary plan description and the same PAM. (Exs. 1, 114, 327.)

50. Even though Varity knew well before December 1987 that MCC was collapsing, Varity continued to extend retail financing to MCC on a "business-as-usual" basis. (Tr. 2230.)

51. At Varity's request, M-F paid some of MCC's suppliers. (Tr. 1509-11.) Varity also made advances for payroll, administration and trade fees, and accounts payable distribution. (Tr. 2943-44, 3087.)

52. Although M-F could put an MCC dealer on "COD", M-F was constrained by Varity from forcing MCC stores into bankruptcy because it would have brought down Varity's "house of cards." (Tr. 1532.)

53. In the fall of 1987, when Varity knew MCC was collapsing, MCC transferred back to Varity six of its most profitable retail stores. (Tr. 807-08.)

54. In October of 1987, Porter told MCC senior management that MCC was about to go into receivership, and recommended to some that they return to Varity or look elsewhere for employment. Porter did not give similar warning or advice to the rank and file. (Tr. 4402-04.)

55. In late 1987 Varity developed an "exposure minimization plan" to minimize Varity's exposure in the event that MCC went into receivership. (Tr. 2231-32, 2266.) Porter and Arnold were on the steering committee. (Tr. 2323-24.) Ludlow worked on the legal aspects of the plan. (Tr. 2375-76.)

56. Through its participation on the MCC board of directors, Varity participated in the decision to put MCC into receivership. (Tr. 2229.)

57. The court finds that MCC was never an independent legal entity separate and apart from defendants. Varity and M-F designed, created, and controlled every aspect of MCC throughout its existence.

58. Exhibit A ("Porter letter") and Exhibit B ("McAdams letter") contain the only written material explaining the formation of MCC directly provided to the Retired Class and the Terminated Class prior to their "transfers" from M-F. (Tr. 4909.)

59. The Porter letter went to the non-retail store employees and the McAdams letter went to the retail store employees. The information in the letters is identical.

60. The information contained in the Porter and McAdams letters included: a cover letter; an "acceptance" form; a transcript of the Porter videotape; a side-by-side comparison of the benefits between M-F and MCC; and a question-and-answer sheet.

61. In order to communicate this information to the CARE employees, defendants arranged various meeting sites in

North America. The only meeting site for plaintiffs was at M-F's corporate headquarters in Des Moines. All available employees met in a large meeting room where a video-taped message from Porter was shown. The tape lasted approximately ninety seconds. The Porter letter was then distributed. According to defendants, the entire meeting, which included viewing the Porter tape, receiving and reviewing the Porter letter, and signing and returning the acceptance of the transfers, was to last thirty minutes at the most. Defendants directed that the tone of the meeting was to be "as light, upbeat, and positive as possible." Defendants wanted to "encourage, all salaried employees to sign the acceptance . . . and to leave [the acceptance form at the meeting]." (Ex. 47; Tr. 4909.)

62. Defendants wanted to have all the employees sign the acceptance (Ex. A page 7) (which in effect transferred M-F employees to MCC) because they did not want to be responsible for the termination costs or the costs associated with the unfunded retirement benefits of employees who either were eligible to retire from M-F on or before May 9, 1986, or who would be retiring from MCC. (Ex. 47.)

63. Information given to the employees portrayed a positive economic outlook for MCC. For example, the Porter letter and the Porter video tape transcript state:

> We are all very optimistic that our new company has a bright future . . .
>
> * * *
>
> . . . we are doing many other exciting things designed to improve the profitability . . . of the business
>
> * * *
>
> This financial restructuring created Massey Combines Corporation and will provide the funds necessary to ensure its future viability.
>
> * * *

[Porter] Finally, despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation. Together we can exploit all available opportunities in the combines business. I look forward to working with you in the future to ensure the success of Massey Combines Corporation.

64. The question and answer sheet ("Q & A sheet") in Exhibits A and B contained eight questions and answers. Defendants developed these questions and answers in anticipation of the "many concerns" by the employees. Defendants purposefully made the questions and answers incomplete, confusing, evasive, and deceptive. Defendants developed more forthright questions and answers, but they opted not to publish them. (Exs. 42, 46, 47.)

65. Information in Exhibits A and B concerning benefits was very limited. That information included a side-by-side comparison showing that M-F's and MCC's benefits were identical. The only question dealing with benefits was number three. The answer simply stated that "benefit programs will remain unchanged." Defendants considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Defendants rejected this disclosure because they believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, Varity began to develop "creative and innovative ways" to reduce employee benefits. (Ex. 67.)

66. Defendants did not include in the Q & A sheet certain questions that they knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for termination pay from M-F. The employees also wanted to know if they could take early retirement from M-F. Defendants purposefully did not provide answers to these and other questions because they wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. (Ex. 47.) Defendants' failures to make these disclosures were to the detriment of the Retired and Terminated Classes.

67. Defendants knew they should tell the employees that they claimed the right to amend or terminate benefits in retirement. Zinkewich wrote to Porter on April 15, 1986, as follows:

> The following proposal results because of the govt's and lenders insisting that in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC.

(Ex. 42.) Defendants ultimately decided to ignore the above set out proposal and not make the disclosure to the employees.

68. The representations made in the Porter and McAdams letters regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading. Defendants knew the representations were materially misleading when they were made. Plaintiffs relied on these representations to their detriment.

69. Project Sunshine was, as mentioned above, a scheme designed, in part, to rid defendants of the obligations to pay benefits to retirees and employees of M-F.

70. Defendants did not attempt to persuade the Individual Plaintiffs to transfer to MCC; rather, defendants unilaterally assigned the Individual Plaintiffs and the obligation to pay their benefits to MCC. The Individual Plaintiffs were not aware that this had occurred until the receivership of MCC. Defendants did not unilaterally assign to MCC their obligation to provide welfare benefits to retirees from the Tractor Division. Those retirees are still receiving welfare benefits under the M-F Plan.

71. M-F maintained an employee benefits package that was intended to attract and retain employees. (Tr. 2220.) M-F described the benefits package to its employees by distributing a three-ring booklet entitled *You and Massey Ferguson* ("*You and M-F*"), which after January 1, 1982 contained Section I. (Exs. 114, 327.) *You and M-F* was written in language designed to be understood by a person with a sixth-grade education. (Tr. 1692.) It contains well over two hundred pages of material.

72. M-F intended that each employee have a copy of *You and M-F* and rely on it for information about benefits. (Ex. 114; Tr. 469.)

73. *You and M-F* was updated from 1974 through 1981 by sending an announcement to the employees followed by replacement pages to be inserted by the employee and instructions that the pages being replaced were to be removed. (Tr. 1314.) John Ruth, president of M-F from 1982 to 1987, never instructed anyone at M-F to end this procedure and he assumed the procedure continued while he was president. (Tr. 1314.)

74. During their employment with M-F and prior to May 9, 1986, plaintiffs were all given a copy of *You and M-F*. They were told they should look to *You and M-F* to determine the employee benefits they were entitled to, including retirement benefits. Some plaintiffs had been told by defendants' representatives that *You and M-F* was the "Benefits Bible."

75. *You and M-F* was first published in 1974. There was no statement in the book about a claimed reserved right to amend or terminate the benefits in retirement. In October of 1978 M-F changed from an insured plan to a self-insured plan and as a part of that transaction adopted the Massey-Ferguson, Inc. Employee Benefits Plan and Trust ("M-F Employee Benefits Plan" or "M-F Plan"). Section 7.4 of the M-F Plan provided that M-F reserved the right to amend or terminate the benefits. This provision was the focal point of *Howe I*. Because of the adoption of § 7.4, M-F had the legal duty to provide each employee by the end of 1978 an updated *You and M-F* that

contained, "in a manner calculated to be understood by the average plan participant [employee]," notification of M-F's claimed right to amend or terminate the benefits. 29 U.S.C. §§ 1022(b) and 1024(b)(1). Also, M-F had the legal duty to provide each employee by July 31, 1979, a summary description of the change in the M-F Plan notifying the employees that M-F reserved the right to amend or terminate the welfare benefits. 29 U.S.C. § 1024(b)(1). In addition, M-F had a legal duty to provide each employee by the end of the year in 1983 an updated *You and M-F* containing all plan amendments made within the preceding five-year period, especially including appropriate notification of M-F's claimed right to amend or terminate the plan. 29 U.S.C. §§ 1022(b) and 1024(b)(1). Furthermore, MCC had a legal duty to provide within ninety days of May 9, 1986, each of its employees with a summary plan description (such as *You and M-F*), which again would have been required to contain a provision properly notifying the employees of MCC's claimed right to amend or terminate the benefits. 29 U.S.C. § 1024(b)(1). Defendants and MCC failed to comply with every one of these legal notification requirements.

76. At MCC the Retired Class continued to rely on *You and M-F* for information about their benefits. (Tr. 479.) They were never told to stop relying on *You and M-F*. (Tr. 479.) No summary plan description was published for MCC employees. (Tr. 4918-19.)

77. *You and M-F* contained the following statements:

> The company has a total compensation policy which keeps pace with industry and is considered to be among the best. This booklet summarizes the various life, health, and disability insurance policies and the retirement income plan for salaried employees. These benefits represent a significant element of compensation in addition to your paycheck since they relieve you of putting aside a part of your cash income to take care of health problems and to provide for your survivors or for your own years in retirement.

Section I. p. 8

When you retire from the Company you take with you a number of benefits from your employment—

* * *

— basic health benefits

— major medical benefits

— dental health benefits

— vision care benefits

— hearing aid benefits

— non-contributory life insurance, 150% of final annual rate of earnings to age 65—then $3000

— life insurance from your contributory policy, if applicable

Section VIII, p. 5.

The basic health, major medical, dental health, vision care, and hearing aid benefits for Company employees continue in retirement. About 3 months before your 65th birthday, you are expected to enroll in the Part 'B' of the social security Medicare program which provides medical insurance in addition to the hospital insurance provided under Part 'A'. At this time the Company will assume you are covered by Medicare, and the Company health benefits will take responsibility for only those covered expenses not covered by Medicare. At the same time, the Company will reimburse you, in your monthly pension check, for the Medicare Part 'B' premium which is deducted from your monthly social security check.

It is your responsibility to inform the Company when your spouse attains age 65 and enrolls in Medicare Part 'B' in order that the Company may reimburse you for the cost of your spouse's Medicare deduction from monthly social security income. It is also your responsibility to advise the Company in the event of the death of your

spouse, so that the Company's reimbursement for Medicare is adjusted.

Section VIII, pp. 7-8.

Coverage under the group benefits plan—basic health and major medical—

1. continues for employees who retire as pensioners and their dependents;
2. continues for surviving dependents of a retiree;

Section IV, pp. 12-13.

Vision Care Insurance continues for employees who retire as pensioners and for their dependents.

Section IV, p. 16.

If you work beyond your 65th birthday, your non-contributory life insurance continues in force until you retire when, effective at midnight of the last day of the month prior to the day pension begins, $3,000 remains in force for the rest of your life, payable to a beneficiary or estate.

Section II, p. 2.

Life insurance coverage in retirement continues to be paid for by the Company.

. . . .

If you enroll in the contributory life insurance plan when you are first eligible, within 31 days of hire, OR participate in it for at least 15 years before retirement, you continue to be insured in retirement at no cost to you.

In retirement before age 66, the insurance continues in force at 50% of your final annual rate of earnings and is reduced by 5% per year on your 66th, 67th, 68th, 69th, and 70th birthdays. The reduction is effective at midnight at the close of the birthday. If you retire at age 66

> or later, the insurance coverage drops to the level designated by your last birthday. At age 70, then, insurance equal to 25% of your last annual rate of earnings is still in force and remains in force for the rest of your life, payable to your beneficiary or estate at time of your death.

Section II, p. 3.

> The dental health plan covers all full-time salaried employees, retirees, and eligible dependents.

Section V, p. 1.

78. The Retired Class and the Individual Plaintiffs understood from this language in *You and M-F* that if they worked for defendants until retirement, they would have the stated insurance coverage for the rest of their lives at the levels being provided to them on the date of their retirement. (Tr. 474.) Other witnesses including those not seeking insurance benefits testified similarly. Ruth, M-F's former president and not a party here, understood M-F did not have a right to terminate benefits for employees who had already retired from the company. (Tr. 1318.) Ruth understood that if he had retired, he would have received insurance benefits for the rest of his life. (Tr. 1315.) Robert Wells, who worked for a number of years in the personnel department and human resources department for M-F and a person who was well acquainted with such problems, (Tr. 3217) understood that once an employee retired, his or her benefits would continue for life. Richard Brown, an officer of M-F and later an officer of MCC, understood that health benefits would continue for life after retirement. (Tr. 818.) Plaintiffs' expectations and understandings were reasonable given the language in *You and M-F*.

79. Jenivie Jack is a person who had worked in the area of benefits and was the person who had gathered the information and wrote the original version of *You and M-F*, which was reviewed by persons in M-F's personnel and human resources departments. (Tr. 1689.) She understood, based on information from the benefits department and the past practices of the

company, that retirement benefits would continue for life. (Tr. 1695-96.) Jack believed that she would have her insurance benefits for life after retirement, and she has continued to receive her benefits from M-F since her retirement in February in 1982. She was not transferred to MCC.

80. M-F's intent to continue benefits for life after retirement was confirmed by past company practice. Defendants were reluctant to attempt to change existing retiree benefits. (Tr. 4053.) From at least 1971 until 1984, benefits for United States salaried retirees were never reduced or terminated. (Tr. 4714.) A January 1, 1984 change in benefits was the only reduction ever made applicable to benefits of existing retirees, and that reduction was minimal. That change was not communicated to existing employees, but only affected retirees. (Tr. 4685.) As a result, the plaintiffs were never on notice that the defendants had on one occasion reduced benefits for existing retirees. Former president Ruth had participated in a series of conversations over a period of several years where it was expressed that M-F could not reduce benefits for people who had already retired. (Tr. 1594-95.)

81. The Individual Plaintiffs and the Retired Class were not informed prior to retirement that their benefits might be terminated by the company. (Tr. 2739.) To the contrary, employees received letters setting forth that certain benefits would continue in retirement. (Ex. 184, p. 243; Tr. 489.)

82. After members of the Retired Class had transferred to MCC and after they had communicated to MCC their decision to retire, they received a post-retirement letter which contained a statement that the welfare benefits were subject to change or termination during retirement. However, these letters were received *after* the employees had completed their employment with defendants.

83. Defendants never distributed the M-F Plan to M-F employees. The Retired Class and Individual Plaintiffs never saw the M-F Plan or its §7.4 (reservation of rights clause) (Ex. 156; Tr. 479.) The few who did see the M-F Plan were all working in the benefits department. However, there were even

people who were working in the benefits department who never saw the M-F Plan and never knew such a plan existed. Top officials including Porter (Tr. 4261.), Ruth (Tr. 1319.), Brown (Tr. 823.), and Jack, author of *You and M-F* and updates thereto, never saw the M-F Plan. (Tr. 1696-1700.) Since these officials were not aware of the reservation of rights clause it is appropriate to find that the rank and file employees were not either.

84. There is nothing in *You and M-F* that informs employees that the company could terminate welfare benefits after retirement. (Tr. 1695.) *You and M-F* does not and never did contain a reservation of the right to terminate benefits. (Tr. 478.) Jack was never told to revise *You and M-F* to include a reservation of the right to terminate. (Tr. 1697-1700.)

85. Defendants have failed to point out any language in *You and M-F* that advises plaintiffs that the company had reserved the right to terminate welfare benefits after an employee retired. Rather, defendants point to language on page 4 of Section IX of *You and M-F* (page 208 of the booklet) that tells plaintiffs they have a right to examine and obtain copies of (at a reasonable charge) all plan documents at the plan administrator's office. There is no description of the plan documents. A reasonable person could conclude the reference on page 208 of the booklet was to *You and M-F* as they were unaware of any other plan or plan documents. Furthermore, it would not have been sufficient or effective to have given a copy of the M-F Plan to each employee because as defendants' benefits communication expert witness Louise Fitzgerald testified it would have been an ERISA violation to give the plaintiffs a copy of the M-F Plan in substitution for the summary plan description. She also testified it would not have been realistic to have expected that the employees would have been able to understand the terms of the M-F Plan.

86. *You & M-F* does contain an ERISA statement of rights notifying participants of the existence of a governing plan document and a statement alerting participants of the company's control over the plan:

STATEMENT OF RIGHTS

As a participant in the Massey-Ferguson welfare, pension, and savings plans for salaried employees you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

> Examine, without charge, at the plan administrator's office and at other specified locations all plan documents and copies of all documents filed by the plan with the U.S. Government.
>
> Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator may make a reasonable charge for the copies.
>
> Receive a summary of the annual financial report of the Pension Plan and of the Savings Plan. The plan administrator is required by law to furnish each participant with a copy of each of these summary annual reports.

* * *

Massey-Ferguson Inc. is the plan sponsor and administrator of the Company's pension, savings, and welfare plans. The plan sponsor has *control* over the plans and the administrator is responsible for administering the plans. (emphasis in original)

87. Over the years 1981 to 1986, M-F changed and/or decreased the level of benefits to employees and/or retirees, by decreasing the benefits or by raising the cost to the employee or retiree, and informed employees and/or retirees of those changes in written communications.

88. In December 1981, M-F amended its health benefits plan to require from active employees contributions toward the cost of health benefits, effective January 1, 1982. This was part of a 10% decrease in fringe benefits to employees.

This modification was communicated to employees through a December 1981 memorandum from Victor Rice (Ex. 554), a January 1982 memorandum from Byron Quandt, an M-F employee specializing in benefits, (Ex. 506), and a December 1981 insert for *You and M-F* (Ex. 503). (Tr. 539, 1803-06.)

89. January 1983, M-F amended its health benefits plan to require a deductible dollar amount to be satisfied before claims would be covered. In addition, dental coverage was reduced 50%. This modification was communicated to employees through a January 1983 memorandum from Gary Fryatt (Ex. 509). Replacement or addition pages to insert in *You and M-F* were not prepared. (Tr. 1480-81.)

90. In December 1983, M-F amended its health benefits plan to adopt a new Comprehensive Major Medical Plan for employees and retirees. The Comprehensive Major Medical Plan required no contributions but required higher deductibles and introduced coinsurance. This modification was communicated to employees and retirees through December 1983 memorandum from John Ruth, a December 1983 memorandum from Byron Quandt and a booklet entitled The Massey-Ferguson Inc. Comprehensive Major Medical Plan. Replacement or addition pages to insert in *You and M-F* were not prepared. (Exs. 284, 585, 511, 512; Tr. 895-96, 1814-15, 3680-81, 3697-98, 5120, 5213-14.)

91. The Massey-Ferguson Inc. Comprehensive Major Medical Plan booklet provides in solid capital letters at the Schedule of Benefits Summary:

> THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME.

92. The written communications referenced above, including the December 1983 memoranda and attached Massey-Ferguson Inc. Comprehensive Major Medical Plan booklet describing changes in welfare benefits for employees and

retirees constituted Summaries of Material Modifications within the meaning of ERISA.

93. Defendants failed to adequately communicate in the Ruth Memorandum, (Ex. 585) which was distributed to employees in December of 1983 or January of 1984, that the company reserved the right to terminate benefits in retirement. The reservation of rights language on the bottom of page 7 of the Ruth memo is ambiguous and was not reasonably calculated to inform the average employee of M-F's claimed reserved right to terminate benefits in retirement. (Ex. 511; Tr. 1484.) Ruth testified that M-F did not intend by this language to inform employees that the company had a right to take benefits away after they had retired. (Ex. 511; Tr. 1597.) A reservation of the right to terminate benefits being provided existing retirees would have been a major change in company policy, yet it was not listed as a "major feature" in Ruth's December 1, 1983 memorandum to employees. (Ex. 585; Tr. 1596.) The Comprehensive Major Medical Plan involved only minor changes in insurance coverage. (Tr. 1431.) The reservation of rights language appears only in the major medical document and does not indicate it applies to the other welfare benefits. (Ex. 511; Tr. 5011.)

94. Although an identical memorandum ("Quandt memo") (Ex. 512) was distributed to retirees, Jack, the compiler and author of *You and M-F* and the Individual Plaintiffs who received this memorandum did not understand it to mean that benefits could be terminated. (Tr. 1837-38.) The Comprehensive Major Medical Plan involved only minor changes in insurance coverage, such as the implementation of coinsurance for major medical expenses. (Tr. 1431.) Consequently, the Individual Plaintiffs who did receive this memorandum still believed that their benefits in retirement would continue for life. (Tr. 1837.) The Retired Class did not receive notice that the change was made applicable to persons who had already retired. (Tr. 4714.)

95. Neither the Ruth memo nor the attached Comprehensive Major Medical Plan contain any language informing

employees that they should stop relying on *You and M-F*. (Ex. 511; Tr. 4723.)

96. It was the defendants' intent to reissue the Comprehensive Major Medical Plan in the format of the *You and M-F* so that the employees could insert the pages in *You and M-F*. (Tr. 4724.) Jill Wellman, the general benefits administration manager of MCC for salaried employees, and others were working on revisions to *You and M-F* in 1984 after the Ruth memo was distributed. (Tr. 4724.) The changes to the existing medical benefits as a result of the Comprehensive Major Medical Plan were never published for inclusion in *You and M-F*. (Tr. 4724.)

97. A reasonable person, if he or she received and read the Comprehensive Major Medical Plan, would not understand it to be a notice that defendants were reserving a right to terminate welfare benefits in retirement.

98. MCC did not adopt an employee benefits plan until May 1, 1987, when it adopted the M-F Plan as its own. (Ex. 535.) Before May 1, 1987, MCC used the M-F Plan. (Tr. 4917.) The only plan produced at trial was the M-F Plan. (Ex. 156.)

99. *You and M-F* does not contain language that authorized defendants to transfer or assign any M-F employee or retiree to another company or plan.

100. Defendants did not otherwise communicate to plaintiffs that defendants claimed to have reserved a right to amend or terminate welfare benefits in retirement.

101. Retiree plaintiffs reasonably held the belief that the welfare benefits described in *You and M-F* were to continue unchanged for the lifetime of retirees.

102. The Termination Allowance Policy in existence at M-F at all times relevant to this action is contained in the PAM. (Exs. 1, 6, 7.) The purpose of the termination allowance policy was to allow the defendants' employees some time to find another job when the company terminated them for a reason

beyond their control. (Tr. 4700) Under the policy, eligible employees would receive one week's pay for each year of service up to ten years and two weeks' pay for every year of service thereafter subject to a maximum of fifty-two weeks' pay. (Ex. 7; Tr. 2450, 3247.) This was the termination allowance policy in effect at M-F just prior to the creation of MCC. (Tr. 3241.) MCC adopted this termination allowance policy and the balance of the PAM. (Tr. 3241, 4695.) There is no dispute that a Termination Allowance Policy was in effect on March 4, 1988.

103. The Termination Allowance Policy stated that:

> It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

(Ex. 7; Tr. 3242.) Defendants' expert witness on termination pay, Walt Winder, testified that receivership constitutes separation for reasons beyond an employee's control. (Tr. 5269, 5293.) Members of the Terminated Class understood that through this language in the PAM, defendants promised that if plaintiffs were terminated for reasons beyond their control, they would receive termination allowance.

104. At a prior time when the defendants' Detroit manufacturing operation was closed down, M-F paid termination allowance to salaried employees who lost their jobs. (Tr. 4730.)

105. Pursuant to the termination allowance policy, persons who are classified as "termination-release" are entitled to receive termination allowance. (Ex. 6; Tr. 3263.) Termination-release is the "nondisciplinary termination by company option." (Ex. 7; Tr. 3244.) The categories listed under "termination-release" are not exhaustive nor exclusive. (Tr. 5269, 5291.)

106. Severance pay for those employees terminated at MCC was to be calculated based on the employee's total years of service with all M-F companies. (Tr. 5247.)

107. A memorandum from Porter dated October 21, 1987, attempted to amend the Termination Allowance Policy for MCC. (Ex. 86.) Porter reduced severance pay for people working for MCC in the event that their employment was to be terminated. (Tr. 4400.)

108. Porter's memorandum states that "[w]ith immediate effect the existing Termination Allowance Policy is rescinded and an amended policy is substituted in its place. The following is a summary of this amended policy." No amended policy was ever produced prior to MCC closing. There is nothing in the memorandum indicating MCC reserved any right to terminate the policy. (Ex. 86; Tr. 5295.)

109. Porter's October 21, 1987 memorandum (Ex. 86) states "[t]he decision to revise the termination policy is one of several actions being undertaken to maintain the viability of the company within the industry." This statement was untrue. On October 6, 1987, a couple of weeks earlier Porter told Brown that MCC "wasn't going to make it" and that Brown "better start looking" [for another job]. (Tr. 804-05.) Furthermore, by this time MCC had broken its borrowing base covenant, which allowed creditors to put MCC into receivership. In August 1987, Porter wrote Rice a handwritten memorandum in which he predicted MCC's "final rites (i.e. restructure, wind-up, sale)" would be finalized by the summer of 1988. (Ex. 88.) Varity's employees were actively plotting how to conceal MCC's inevitable demise from the Canadian Government during September 1987. (Tr. 4107-08.)

110. Defendants' conduct in designing and implementing Project Sunshine was willful, wanton, malicious, and in bad faith vis-a-vis all plaintiffs.

111. M-F was a fiduciary with respect to the M-F Employee Benefits Plan. M-F's board of directors was the M-F Plan's "named fiduciary" within the meaning of 29 U.S.C. § 1002(21)(A). (Ex. 156, p. 16.) Also, M-F was the "administrator" and "sponsor" of the Plan within the meaning of 29 U.S.C. § 1002(16)(A) and (B).

112. Varity was a fiduciary with respect to the M-F Plan because Varity at all times controlled M-F.

113. M-F was a fiduciary with respect to the MCC Employee Benefits Plan, to the extent it existed apart from the M-F Plan, because MCC simply adopted the M-F Plan in its entirety. Including the SPD, the actual plan language itself and common administrators. (Ex. 535.) M-F was a named fiduciary of M-F plan, and was also a fiduciary with respect to the MCC Employee Benefits Plan. (Exs. 156, 535.)

114. It necessarily follows then that Varity was a fiduciary with respect to the MCC Employee Benefits Plan because Varity was a plan fiduciary of the plan adopted by MCC.

115. After MCC went into receivership, defendants repurchased the conventional combine technology and the combine unique parts from MCC's receiver at bargain prices. Defendants began selling combines manufactured by third-party producers within one year of MCC's receivership.

116. After Project Sunshine, Varity was profitable. Varity's net income was $81.7 million for fiscal year 1988; $92.1 million for fiscal year 1989; and $101.5 million for fiscal year 1990. Varity's net worth at the close of fiscal year 1990 was $786.4 million. (Ex. 274A.)

117. The value of past benefits lost by the Retired Class is $696,195. (Ex. 310.)

118. The value of benefits lost by the Terminated Class is $1,536,117. (Ex. 269.)

119. The value of past benefits lost by the Individual Plaintiffs as of the time of the trial were as follows:

John Altomare	$ 5,000
Charles Barron	3,160
Alexander Charron	7,661
Charlotte Chiles	13,106
Anita Crowe	11,877
Ray Darr	1,700
Doris Guidicessi	8,219

Barnett Lucas	3,150
Robert Skromme	18,284
Estate of Walter Smith	10,655

(Ex. 270C.)

Insofar as the court stated facts in the introduction to these findings and conclusions or states additional facts below as part of the conclusions of law, those facts are found pursuant to Fed. R. Civ. P. 52(a).

CONCLUSIONS OF LAW

LAW OF THE CASE

For a discussion on the Law of the Case Doctrine see this court's order on motion for judgment as a matter of law and motion for new trial pages 5-8 [28a-30a], where all arguments in relation to Law of the Case are denied.

ALTER EGO

Throughout the course of this litigation the plaintiffs have argued that MCC from its inception was designed to fail. Plaintiffs maintained that MCC was a vehicle of disposal for Varity in reducing its debt and heritage cost[3] burdens. Plaintiffs seek a determination that defendants were at all times the alter egos of MCC and therefore responsible for their obligations.

In the context of ERISA, the Eighth Circuit has employed a five-factor test in deciding when to disregard the corporate form. *Contractors, Labors, Teamsters & Engineers Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985). A district court may disregard the corporate form if: (1) the corporation is undercapitalized; (2) without separate books; (3) its finances are not kept separate; (4) the corporation is used to promote fraud or illegality; and (5) the corporation is merely a sham. *Id.* The First Circuit in *United Elec. Workers*

[3] Heritage costs are those costs associated with retiree benefit obligations.

v. 163 Pleasant Street Corp., 960 F.2d 1080, 1092-93 (lst Cir. 1992), while citing *Hroch* adopted a three factor test when determining when it may be appropriate to disregard corporate separateness in an ERISA-related dispute. Those factors are: (1) whether the parent and the subsidiary ignored the independence of their separate operations; (2) whether some fraudulent intent existed on the principals' part; and (3) whether a substantial injustice would be visited on the proponents of veil piercing should the court validate the corporate shield. *Id.*

The court considers whether the entities have a "substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers, and supervision." *Greater Kansas City Laborers Pension Fund v. Thummel*, 738 F.2d 926, 929 (8th Cir. 1984).

Continuity of the work force is also a relevant consideration. *Id.* Courts also look to additional factors to determine alter ego liability when a subsidiary corporation is created, they include:

(1) common stock ownership between the parent and the subsidiary;

(2) common directors and officers;

(3) common business departments between the parent and subsidiary;

(4) whether the parent and subsidiary file consolidated financial statements and tax returns;

(5) has the parent financed the subsidiary;

(6) did the parent cause the incorporation of the subsidiary;

(7) whether the subsidiary is undercapitalized;

(8) has the parent paid the salaries and other expenses of the subsidiary;

(9) whether the subsidiary receives business other than the parent's business;

(10) has the parent used the subsidiary's property as its own;

(11) whether the daily operations of the corporations are kept separate; and

(12) whether the subsidiary has observed the basic formalities.

United Steelworkers of America AFL-CIO-CLC v. Connors Steel Company, 855 F.2d 1499, 1505 (11th Cir. 1988). However, not all mentioned factors have to be present. *Id.* Rather, the court must look to the totality of the circumstances. *Id.* "[T]he degree of injustice that would be visited on the litigants by recognizing the corporate identity" must be considered in ERISA actions. *Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986). The *Alman* court stated:

> Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally . . . Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent.

Id. at 3-4 (citing 29 U.S.C. section 1001).

When examining the above-listed tests and keeping in mind the following facts the court concludes that defendants were the alter egos of MCC:

1. As conceived, MCC was not a viable business entity, but rather was envisioned as a means by which defendants could rid themselves of corporate debt, overvalued inventory, unprofitable stores, and expensive employee benefit obligations. Profitable segments of what logically would have been part of

MCC's business, and desirable assets, were retained by defendants.

2. The creation of MCC was overseen and undertaken by employees and attorneys of Varity, ostensibly acting for both sides of the transaction.
3. MCC retained employees who had worked for MF by persuading them to join MCC instead of taking early retirement, termination, or other transfer from M-F. The tools of persuasion employed included deliberate misrepresentations, half-truths and omissions.
4. On May 4, 1986, the first day of MCC's legal existence, the company was on the verge of bankruptcy. It began liquidating assets immediately.
5. Varity controlled MCC's board of directors.
6. MCC's senior executive officers were controlled by Varity. Ivan Porter, while president of MCC remained an employee of Varity. This "secondment" was not made known to any of the plaintiff class.
7. MCC and MF shared business facilities, which by all outward appearances were MF facilities.
8. Varity controlled MCC's business through its ORC.
9. Although Varity and MCC billed each other for services each provided to the other, the services were not always paid for. Indeed, Varity and MCC shared facilities and business departments including legal, patent, tax, accounting, management, information systems, parts supply and warehousing, parts sales and marketing, treasury, internal audit, expert sales, retail credit and financing.
10. Defendants and MCC did not observe basic corporate formalities in several significant respects. Intercompany accounts were not reconciled. Employee benefits were administered by the same human resources department, and all employees of both

defendants and MCC relied upon the same plan documents.

11. When it appeared MCC would be going into receivership, Varity exercised its control of MCC's affairs by taking back MCC's desirable assets and implementing a plan to minimize Varity's exposure.

In support of its alter ego theory plaintiffs called Yale Kramer as an expert witness.[4] The court finds Mr. Kramer's testimony credible and enlightening. A brief excerpt of his trial testimony is therefore warranted here:

Q . . . You have testified, Mr. Kramer, that Massey Ferguson, Ltd., before the creation of Massey Combines Corporation was facing serious financial problems; is that correct?

A Yes.

Q What options does a company facing financial problems such as those being faced by Massey Ferguson, Ltd., have, based on your knowledge and expertise to try to remedy those problems?

A Well, every company in the industry was having terrible financial problems. The industry had really deteriorated and the question of whether it was going to come back at any time soon was discussed in the industry. Different people had different opinions. The clear circumstances as evidenced by the one chart we had up there, I believe the last one showed that

[4] Mr. Kramer is the president of Reiss Corporation and also the president of K. R. Business Brokers. He is a licensed attorney and a certified public accountant and has formerly served as an investment banker. The Reiss Corporation is involved in the valuation of closely held businesses and business interests. Mr. Kramer was formerly vice president of corporate finance for R. G. Dickinson Company, which is a regional investment banking firm where he was in charge of the corporate finance department. He was involved in negotiating mergers and acquisitions. Prior to working for R. G. Dickinson, Mr. Kramer was with Peat Marwick Mitchell, where he was a tax specialist.

Massey Combines or the CARE Division which became Combines was losing very substantial sums of money each year.

Financial information in the Project Sunshine documents, and the proxy materials and the annual report said that the management expected losses to continue at approximately the same level, at least for the near future. The CARE Division was in great trouble. The rest of the company was having difficulty as those—the charts showed they were making money here in the last two years, but the CARE Division was a real drag on them.

Q Given the circumstances then, again, based on principles of the area of your expertise, what options would they have had?

A They could close it down, liquidate the assets. They could sell off as much as they could as a business. Chances of doing that were fairly slim. I mean they might be able to sell off some of the assets, but they couldn't get rid of all those liabilities or they could do something like they did here, a reorganization where they put some assets and some liabilities into an affiliated company for the purpose of hiding the losses.

Q Now, the first thing you mentioned close down, is that, like, discontinue the CARE Division? Is that what you're really talking about?

A Basically, that's what they did in a two-step process. Instead of selling off the assets and paying off liabilities in Massey-Ferguson, Ltd., what they did was put it into a separate corporation, then selling off the assets and start paying off some liabilities.

Q Now, if they had done it just by closing down and discontinuing, what would have been different, if anything, for Massey-Ferguson, Ltd./Varity than the way it was creating Massey Combines?

A Well, first of all, there would have been very substantial losses that would have appeared on the books of Massey-Ferguson, Ltd., that the way it was handled did not appear.

Second, there would have been substantial write-downs of asset values and those write-downs wound up happening to Massey Combines rather than Massey-Ferguson, Ltd. The effect of some of these things was just to hide from the public what was really happening.

Q What would have been different, if any with regard to obligations to employees and or retirees if they had just discontinued and closed down the CARE Division?

A Well, they would not be standing behind a corporate shield. They would have had to treat those employees and retirees as any other employees and retirees within the company.

* * *

Q What opinion, if any, do you have based upon recognized methods of conducting business that you've learned in connection with valuing business as to this selection of this option by Massey-Ferguson, Ltd.?

A If you put aside questions of ethics or morality and look just at the financial, it was a brilliant plan. Massey-Ferguson, Limited, was able to avoid showing very substantial losses. They were able to avoid paying some liabilities passed to Massey Combines. They are able to avoid the negative connotations of going out of business, they avoided some pension liabilities.

They accomplished quite a few things, and financially speaking, it was a brilliant plan. It was devised by financial people who knew how to use the rules. For example, by making this affiliated company less

than fifty percent owned by Massey-Ferguson, they avoided showing the losses. If they owned one hundred percent of that subsidiary, it would have had no effect as far as showing the losses.

They used accounting rules with the reduction in liabilities by using the Canadian accounting treatment. The SEC, the U. S. Securities and Exchange Commission, requires that retractable, redeemable preferred stock not be treated in the equity section so by using Canadian—making a Canadian corporation following Canadian principles, using redeemable preferred stock, they made all of that look like equity when the SEC wouldn't allow them to do that if they had been a U.S. company under the SEC rules.

Q Let me follow up with another question. What opinion, if any, would you have had with regard to the method that they used if it was to be represented as a creation of an ongoing company that was going to be operating company for some period of time into the future if it was represented in that fashion?

A Well, I think that's very, very questionable. Questionable whether it could be ongoing, the amount of debt they had. In the business lines that they were in, they couldn't service the debt, they weren't producing. They had so many, many employees that they were going to be retiring or discharging. They had all these retirees that were transferred in there that I believe there was four times as many retirees as there were employees in the company, and then they were going to lay off more people.

Chances of this company being successful were very, very small, they were not independent in that they had been controlled and continued at least they were obligated under the restructured plan to have all this debt and all this other stuff, they were not independent. And as far as a stand alone, there was no way

they could stand alone under the circumstances, and they didn't stand alone.

Q Based upon your knowledge and experience and background, do you have an opinion as to whether or not a reasonably prudent businessman would represent the creation of Massey Combines Corporation as a stand alone company independent of Massey-Ferguson, Ltd. as an operating company as of May 9, 1986?

A I would disagree with that characterization. I don't believe it was independent. I don't believe it was stand alone. I don't believe it was an operating company. I believe it was a division of Massey-Ferguson, Ltd., that was organized for the sole purpose of liquidating assets with a glimmer that if things—if things turned around, unusual things happened in the industry, that maybe it could survive, but it was a substantial gamble rather than an investment.

(defendants objections omitted from the above text) TR. 2947, line 3 - 2953, line 16. Questions by Mr. Smith, Answers by Yale Kramer.

As noted above Mr. Kramer's testimony on the corporate form MCC was persuasive and damaging to defendants' arguments. In light of his testimony the court will further address his conclusions to existing law.

As the Fifth Circuit has noted in *Jon-T Chemicals. Inc.*, 768 F.2d 686, 696 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986):

> A corporation, unlike proteus, cannot assume a new form at will. While we generally recognize a corporation's attempt to assume the guise of a subsidiary, even this expedition into fantasyland has its bounds. Here, the corporate veil with which appellants would enrobe the subsidiary to give it the semblance of being attired in corporate clothing was so diaphanous that the district court could well see through it.

The court after a review of the evidence finds that MCC was not a stand alone corporation. Project Sunshine was a brilliant financial restructuring move which undoubtedly saved Varity millions of dollars in reducing their debt and avoiding substantial heritage costs. The totality of the circumstances however reveals a corporation who but for its lifeline to M-F and Varity would not have been afloat on day one of its corporate existence. When Varity and MF cut that lifeline inevitably MCC sank. The court further finds that communications to employees of MF were laced with fraudulent misrepresentations in order to get them to sign acceptances of employment. MCC was a sham from the start. Accordingly, defendants are not able to hide behind this bankrupt shell of a company when required to make their employees whole. Defendants were the alter egos of MCC.

BREACH OF CONTRACT—COUNT 1

Discussion of plaintiffs' breach of contract claim is discussed on pages 10-17 [32a-37a], in the court's order on motions for new trail and judgment as a matter law. The court set aside the jury verdict on the breach of contract claim.

BREACH OF FIDUCIARY DUTY—COUNT 2

MF-RETIRED INDIVIDUAL PLAINTIFFS
MCC-RETIRED CLASS

Plaintiffs argue in support of their claim under this theory that defendants are liable for breach of fiduciary duty pursuant to 29 U.S.C. §§ 1104 and 1132(a)(3). Plaintiffs in support of their claim argue that defendants made misleading communications to plaintiffs in violation of their fiduciary duties by assuring plaintiffs that their benefits would not be changed when they "transferred" to MCC. Defendants failed to disclose MCC's unstable financial condition and poor prospect for survival; failed to disclose the effects that MCC's probable bankruptcy, receivership or insolvency would have on the welfare benefits of MCC employees. Further, plaintiffs contend that defendants failed to inform them in *You and*

M-F, as required by ERISA, of a reserved right to amend or terminate the welfare benefits plan. As a result of these misrepresentations, plaintiffs claim that they were denied the opportunity to make informed decisions about acceptance of employment with MCC.

Defendants argue that the Eighth Circuit has held business decisions by an ERISA employer not to be governed by the fiduciary standard of 29 U.S.C. § 1104. The Court states that:

> Under the dual capacity doctrine, the [employer] can act in accordance with its interests as employer when not administering the plan or investing its assets. Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits.

Adams v. LTV Steel Mining Co., 936 F.2d 368, 370, (8th Cir. 1991); *see also Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (employer's decision to terminate rather than carry employees on payroll after sale of plan so they could collect retirement benefits is employment decision "not subject to ERISA's fiduciary standard of care"). Defendants further argue that plaintiffs' breach of fiduciary duty claims are barred because they are claims for benefits, not claims brought on behalf of a plan. *See Simmons v. Southern Bell Telephone & Telegraph Co.*, 940 F.2d 614, 617 (11th Cir. 1991).

To recover on a claim for breach of fiduciary duty arising out of defendants' conduct with respect to a plan, plaintiffs are required to prove by a preponderance of the evidence:

(1) Defendants were fiduciaries with respect to the plan of which plaintiffs were participants or beneficiaries.

(2) Defendants breached their fiduciary duties.

(3) Plaintiffs' damages from the breach of the fiduciary duties.

See McNeese v. Health Plan Marketing. Inc., 647 F. Supp. 981, 983-87 (N.D. Ala. 1986).

Every plan must have at least one named fiduciary who has authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1). In addition, under ERISA:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The term "fiduciary" should be broadly construed to effectuate the remedial purposes of ERISA. *See, e.g., Donovan v. Mercer*, 747 F.2d 304, 308-09 (5th Cir. 1984). The statutory definition "includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." *Id.* at 308 (quoting H. R. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4639, 5038, 5103). The test is a functional one. *See, e.g., Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1987). "[F]iduciary status exists with respect to any activity enumerated in the statute over which the entity exercises discretion or control." *Id.*

Employers who sponsor the plan, the directors, officers or shareholders thereof, and plan administrators are among those parties who may be ERISA fiduciaries with respect to a plan, where they possess sufficient authority or control over the investment of plan assets or the administration of the plan. *See* R. Cooke, *ERISA Practice & Procedure* § 6.02 (1989 and 1991 Supp.); *United States Steel Corp. v. Commonwealth of Pa. Human Relations Comm'n*, 669 F.2d 124, 126-28 (3d Cir. 1982) (employer is fiduciary when it has authority to alter terms of plan and authority to administer plan); *McNeese v. Health Plan Marketing. Inc.*, 647 F. Supp. 901, 983-85 (N.D. Ala. 1986) (plan administrator who exercises discretionary

control over administration of plan is fiduciary as to matters within its control). A person is a fiduciary, however, only to the extent the person is engaged in functions which confer fiduciary status, i.e., when administrating the plan or investing its assets. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). Thus, an employer that is also an ERISA fiduciary is free to make its business decisions for business reasons, without regard to the collateral effect those decisions might have on contingent employee benefits. *Id.; Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991).

An ERISA fiduciary's duties are statutorily prescribed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent and to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1104(a)(1). Misrepresentations or omissions in a fiduciary's communication with participants and beneficiaries regarding plan administration are breaches of the fiduciary duties recognized by ERISA. *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). "Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." Id.

Although business decisions made by a fiduciary in a capacity other than its capacity as fiduciary cannot themselves be a breach of fiduciary duty, such a fiduciary must make no material misrepresentations regarding administration of the plan in connection with its business decisions. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162-64 (6th Cir. 1988); *Payonk v. HMW Industries. Inc.*, 883 F.2d 221, 225-26- (3d Cir. 1989) (*Berlin* prohibits affirmative misrepresentations about rights under a plan affected by employer's business decisions). A fiduciary's failure to act or pay benefits in accordance with plan documents is a breach of fiduciary duty. 29 U.S.C. § 1104(a)(1)(D). A fiduciary's failure to effectuate proper disclosure of the terms of the plan in the summary plan description is a breach of fiduciary duty. *See Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1183-86 (3d Cir. 1985). A fiduciary's failure to notify participants and beneficiaries of a plan's financial problems, where they are apparent to the fiduciary, is a breach of fiduciary duty. *See, e.g., McNeese v. Health Plan Marketing. Inc.*, 647 F. Supp. 981, 985-86 (N.D. Ala. 1986) (failure to notify participants of employer's delinquent contributions to pension fund); *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F. Supp. 359, 377 (N.D. Ga. 1986) (same). In administering a plan, a fiduciary may not favor one group of plan participants over another. *Winpisinger v. Aurora Corp. of Ill., Precision Castings Div.*, 456 F. Supp. 559, 566 (N.D. Ohio 1978).

Individual participants and beneficiaries may not invoke 29 U.S.C. § 1109, through its civil enforcement provision, 29 U.S.C. § 1132(a)(2), as a basis to recover damages they suffered as a result of a breach of fiduciary duty. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96 (1985). This portion of ERISA only allows participants and beneficiaries, on behalf of the plan, to recover damages suffered by the plan; the recovery

goes to the plan. Nevertheless, individual participants and beneficiaries may sue under 29 U.S.C. § 1132(a)(3) for an ERISA fiduciary's violation of 29 U.S.C. § 1104, and recover their own damages. The scope of the remedy provided by 29 U.S.C. § 1132(a)(3) was an issue left open by *Russell*, 473 U.S. at 148-54, 105 S.Ct. at 3094-96 (Brennan, J., concurring); *see also Hozier v. Midwest Fasteners. Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (recognizing open question); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984) (affirming award to class of participants and beneficiaries for fiduciaries' breach of 29 U.S.C. § 1104 duties).

This court concludes that ERISA provides for a cause of action by individual participants and beneficiaries who are victims of an ERISA fiduciary's breach of fiduciary duty, and allows such plaintiffs to recover their own compensatory damages. *See Bartucca v. Katy Industries. Inc.*, 668 F. Supp. 111, 112-13 (D. Conn. 1987). Recognition of such a cause of action is compelled by the plain language of 29 U.S.C. § 1132(a)(3), which authorizes an individual participant or beneficiary to bring a civil action "to enjoin *any act or practice* which violates *any provision* of this title or the terms of the plan, or . . . *to obtain other equitable relief . . . to redress such violations*." 29 U.S.C. § 1132(a)(3) (emphasis added). Violation of § 1104 is an act which violates ERISA, and the remedy allowed in § 1132(a)(3) is in addition to the remedy allowed in § 1132(a)(2). A participant or beneficiary should not be limited to proving damage to the plan in order to obtain relief to redress violations of ERISA. Indeed, in this case "the plan" has not been damaged—only individual participants and beneficiaries who were denied promised benefits have been damaged.

Recognition of such a cause of action is consistent with "black-letter trust law," as stated by Justice Brennan in *Russell. Russell*, 473 U.S. at 152-53, 105 S.Ct. at 3095-96 (Brennan, J., concurring). Trust law provides that a fiduciary owes strict duties running *directly to the trust beneficiaries. Id.*, 105 S.Ct. qt 3095 (citing Restatement (Second) of Trusts § 182 (1959); Bogert, *Law of Trusts* § 109 (1973)).

The court notes that the Eighth Circuit Court of Appeals approved a damage award to a class of individual participants and beneficiaries for plan fiduciaries' breach of duty in *Monson*, 739 F.2d 1293. In addition, at least one federal district court has allowed an individual participant or beneficiary to sue a plan fiduciary for damages sustained by the participant or beneficiary as a result of a breach of fiduciary duty under 29 U.S.C. § 1104. *See St. Mary Medical Center v. Cristiano*, 724 F. Supp. 732, 740 (C.D. Cal. 1989) (assignee of participant's rights).

Awards of money damages for past benefits lost as a result of the breach of a fiduciary duty is an appropriate remedy to redress such a breach as allowed by 29 U.S.C. § 1132 (a)(3) where the breach only damages individual participants and beneficiaries but not the plan itself. *See Warren v. Society Nat'l Bank*, 905 F.2d 975, 981-82 (6th Cir. 1990) (money damages available for violation of 29 U.S.C. § 1104), *cert. denied*, ___U.S.___, 111 S.Ct. 2256, 114 L.Ed.2d 709 (1991); *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984) (allowing money damages for violations of 29 U.S.C. § 1104); *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp. 981, 986-87 (N.D. Ala. 1986) (allowing this remedy).

Applying these standards to the present case, the court concludes based on the findings of fact that M-F was a fiduciary with respect to the M-F Plan. M-F was the administrator of the Plan and exercised discretionary authority and control with respect to every aspect of the management and administration of the Plan. Varity was a fiduciary with respect to the M-F Plan because Varity at all times controlled its alter ego, M-F. In addition, the evidence showed that Varity, by itself and through M-F, exercised discretionary authority and control respecting the management and administration of the Plan.

M-F and Varity were also fiduciaries with respect to the MCC Plan because MCC simply used the M-F Plan as its own and, on May 1, 1987, formally adopted the M-F Plan in its entirety. The evidence further showed that Varity and M-F exercised discretionary authority and control with respect to

the management and administration of the MCC Plan both directly and through their alter ego MCC.

The court concludes that defendants breached their fiduciary duties to plaintiffs in the following particulars, as further detailed in the findings of fact:

a. By failing to properly disclose the terms of the Plan in the summary plan description *You and M-F*, including in particular the failure to disclose the claimed reservation of a right to amend or terminate as set forth in § 7.4 of the Plan.

b. By making material misrepresentations and omissions to the Retired and Terminated Classes in connection with the prospective transfer of those plaintiffs' employment and benefit rights to MCC, including the misrepresentation of MCC's prospects for success and the failure to disclose its probable failure and the effect thereof on plaintiffs' benefits. These misrepresentations and omissions also prevented the Retired and Terminated Classes from electing early retirement or taking severance pay from M-F as an alternative to accepting employment with MCC.

c. By favoring other classes of employees and retirees over those of the CARE division with respect to the continuation of their rights under the Plan.

d. By failing to pay benefits according to the applicable terms of the Plan documents.

e. By attempting a facially invalid unilateral assignment of the benefit rights of the Individual Plaintiffs from the M-F Plan to the MCC Plan, including the failure to inform the Individual Plaintiffs of the purported assignment and the failure to inform them of the relevant facts concerning MCC which would have been essential to their evaluation of any such proposed assignment.

The MCC-Retired subclass as well as the Individual Plaintiffs are therefore entitled to recovery of compensatory dam-

ages for unpaid past benefits and to injunctive relief under 29 U.S.C. § 1132(a)(3).

MCC-TERMINATED CLASS[5]

Sections 3.05 and 5.01 of the Personnel Administration Manual ("PAM") Exs. 6, 7) constitute employee welfare benefit plan documents within the meaning of ERISA which governed the provision, level, extent and duration of severance benefits. Section 3.05 of the PAM provides:

> D. "*Termination - Release*" is the non-disciplinary termination by Company option or mutual agreement of an employee as the result of circumstances such as the following:
>
> 1. employee is putting forth his best effort, but cannot perform at an acceptable level in his present position;
>
> 2. employee not designated for layoff who refuses an offer of work which is considered unsuitable according to Section IV.A.4. of this procedure;
>
> 3. employee is habitually tardy or absent because of factors beyond his control;
>
> 4. employee is no longer performing at an acceptable level as a result of significant change in position requirements;
>
> 5. employee is separated as the result of the sale of a Company-operated retail store and is not reemployed by the successor store within thirty (30) days following the date of its transfer to the purchaser; or
>
> 6. other individual reasons consistent with this P.A.M. as approved by the Director Personnel - Head Office.
>
> Terminations of this type are eligible for termination allowance.

[5] This subclass consists of persons who worked for M-F before May 9, 1986 and were terminated when MCC went into receivership on March 4, 1988.

Section 5.01 of the PAM provides:

III. *GENERAL*

A. It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

1. This practice does not apply to salaried employees -

a. with less than three months' continuous service;

b. hired as Limited Service Employees (casual-temporary); or

c. hired under the Cooperative Education Student Program.

B. The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

C. Eligibility for termination allowance is based upon the separation classification as outlined in P.A.M. 3.05.01, Separations - Salaried Employees.

1. An employee will not be eligible for termination allowance if the separation is classified as any of the following:

a. "Quit"
b. "Discharge"
c. "Layoff"
d. "Retirement, Death or Disability"
e. "Termination - Unsatisfactory"
f. "Assignment Completed"

2. An employee whose separation is classified as "Termination - Release" will be eligible for termination allowance.

* * *

G. Approval Procedure

1. The manager of the terminated employee will initiate termination action in accordance with PAM 3.05.01, Separations - Salaried Employees. Recommendations regarding termination allowance will be noted in a separate memo. The initiating manager will make only recommendations; he or she will not calculate the actual amount of termination allowance. No commitment is to be made to the employee until notice has been received that the allowance has been authorized.

2. Upon receipt of the Employee Profile and accompanying memo, Personnel Administration Department will review the recommendations and details regarding the termination. Any termination allowance must be approved by Personnel Administration Department. Recommendations are to be based only on the reasons outlined on the Employee Profile. Therefore, it is important that concise and accurate explanations be given to the employee and be provided on the Employee Profile (Form MF-4197).

The plan language above clearly states that "an employee will not be eligible for termination allowance if the separation is classified as any of the following: quit, discharge, layoff, retirement, death or disability, termination - unsatisfactory, assignment completed". The evidence is clear, without the transfer to MCC, employment conditions at M-F for this subclass were going to change because of the large losses. Accordingly, this subclass would have been "out of work" soon in any event. Under the factors listed above this subclass of plaintiffs is unable to state a successful claim.

Based on *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113-15 (1989), this court finds that with defendants reservation of the right to interpret this plan our standard of

review is not de novo but an arbitrary and capricious standard. When viewed as a whole, M-F's termination - severance pay plan did not create any reasonable expectations in the MCC-terminated subclass. Accordingly, recovery under the breach of fiduciary duty theory is denied for this subclass.

INTERFERENCE WITH PROTECTED RIGHTS—COUNT 5

The court addresses this count in the Court's order on defendants' motions for judgment as a matter of law and for new trial at pages 18-24 [38a-43a], where the court affirmed the jury verdict on the interference with protected rights claim as it pertains to the MCC Retired Class and the individual plaintiffs, but set aside the jury verdict on this claim that was awarded to the MCC Terminated Class.

ESTOPPEL—COUNT 4

MF-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

Under this claim plaintiffs assert that the representations set forth in Exhibits A and B establish their right to a fixed level of benefits pursuant to a theory of promissory or equitable estoppel. Plaintiffs argue that the evidence shows that defendants promised plaintiffs that welfare benefits would be unchanged when they transferred to MCC, and would remain unchanged in retirement. The plaintiffs claim that these representations were such that defendants expected or should have expected that they would induce action or forbearance by plaintiffs. In reliance on those promises, plaintiffs provided services for defendants, then retired and did not look for other employment.

Defendants rely on the Eighth Circuit's ruling in *Howe I* in which it stated after looking at the plan documents, publications and the Company's practices that no promise of lifetime benefits or benefits vested upon retirement. Therefore, the defendants argue that the key ingredient of promise is missing in the estoppel claim. Defendants further argue that ERISA does not recognize a claim for estoppel.

As the law of ERISA emerges, one fact remains constant. parties in ERISA suits will continue to dispute which common law claims have been preempted and those which have not. As Chief Judge Waters notes in *Fitch v. Arkansas Blue Cross and Blue Shield*, 795 F.Supp. 904, 906 (W.D. Ark. 1992), "in recent years the issue of whether state law principles of estoppel apply to an ERISA governed employee benefit plan has been the subject of numerous reported decisions." After a careful and through review of this case law Judge Waters concluded that an estoppel claim would be recognized by the Eighth Circuit Court of Appeals in some circumstances. In reaching his decision, Chief Judge Water states:

> It has also been noted that the language contained in 29 U.S.C. section 1132(a)(3) allowing a participant or beneficiary to bring a civil action to "obtain other appropriate equitable relief" evidences Congress's intent that federal courts fashion federal common law. *Law v. Ernst & Young*, 956 F.2d 364, 369 (1st Cir. 1992) (*citing, Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 156, 105 S.Ct. 3085, 3097, 87 L.Ed.2d 96 (1985) (Brennan, J. concurring in judgment)). Additionally, a line of case law exists that imposes liability upon reliance on misstatements or errors in the summary plan description, even when the misstatements conflict with the plan itself. *See e.g. Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988).

Fitch at 906-07.

Serious doubts have been expressed over the extension of plan eligibility through estoppel and the courts have placed various limitations on the use of these principals. *Fitch* at 907. One of the main reasons for this apprehension is the desire to protect the actuarial soundness of benefit plans. This concern is not a factor in the case at bar since the benefit plans here are self insured.(Findings of Fact number 3).

The Court of Appeals for the Eleventh Circuit has held that claimants cannot succeed on estoppel arguments based on oral modifications of employee benefit plans. *Nachwalter v. Christie*, 805 F.2d 956 (11 Cir. 1986). However, courts are

allowed to fashion a common law equitable estoppel in cases involving oral interpretations of ambiguities in such plans. *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285-86 (11th Cir. 1990), *cert denied*, ___ U.S. ___, 111 S.Ct. 675, 112 L.Ed.2d. 668 (1991); *See also Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 820-23 (10th Cir. 1992).

The elements of federal common law estoppel are:(1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably relied on the misrepresentation. *National Companies Health Benefit Plan v. St. Joseph's Hospital*, 929 F.2d 1558, 1572 (11th Cir. 1991). *See also Heckler v. Community Health Services*, 467 U.S. 51, 59, 104 S.Ct. 2218, 2223-24, 81 L.Ed.2d 42 (1984).

After a review of the above listed factors the court finds that all factors are present. The first, defendants represented that plaintiffs' benefits would remain unchanged with MCC. (*See* exhibits A and B) Second, defendants knew that their SPD's were faulty and could represent a false impression of the benefits plan. Third, defendants wanted to paint a rosy picture of the future of MCC in order to induce plaintiffs to accept the transfer. Fourth, under ERISA an SPD must contain any termination or modification language. *You and M-F* was silent in this regard, therefore as a matter of law plaintiffs were unaware of the right to terminate, amend or modify the plan. Fifth, all plaintiffs either knowingly and willingly accepted the transfer (MCC- Retired subclass) or without their knowledge were assigned to MCC (Individual Plaintiffs).

You and M-F contained the following statements in which a reasonable M-F and MCC retiree or employee could base their understanding that their welfare benefits would continue into retirement:

> The company has a total compensation policy which keeps pace with industry and is considered to be among

> the best. This booklet summarizes the various life, health, and disability insurance policies and the retirement income plan for salaried employees. *These benefits represent a significant element of compensation in addition to your paycheck since they relieve you of putting aside a part of your cash income to take care of health problems and to provide for your survivors or for your own years in retirement.* (emphasis added)

Section I, p. 8.

> When you retire from the Company you take with you a number of benefits from your employment—
>
> * * *
>
> — basic health benefits
>
> — major medical benefits
>
> — dental health benefits
>
> — vision care benefits
>
> — hearing aid benefits
>
> — non-contributory life insurance, 150% of final annual rate of earnings to age 65—then $3000
>
> — life insurance from your contributory policy, if applicable

Section VIII, p. 5.

> The basic health, major medical, dental health, vision care, and hearing aid benefits for Company employees continue in retirement. About 3 months before your 65th birthday, you are expected to enroll in the Part 'B' of the social security Medicare program which provides medical insurance in addition to the hospital insurance provided under Part 'A'. At this time the Company will assume you are covered by Medicare, and the Company health benefits will take responsibility for only those covered expenses not covered by Medicare. At the same time, the Company will reimburse you, in your monthly

pension check, for the Medicare Part 'B' premium which is deducted from your monthly social security check.

It is your responsibility to inform the Company when your spouse attains age 65 and enrolls in Medicare Part 'B' in order that the Company may reimburse you for the cost of your spouse's Medicare deduction from monthly social security income. It is also your responsibility to advise the Company in the event of the death of your spouse, so that the Company's reimbursement for Medicare is adjusted.

Section VIII, pp. 7-8.

Coverage under the group benefits plan - basic health and major medical—

1. continues for employees who retire as pensioners and their dependents;

2. continues for surviving dependents of a retiree;

Section IV, pp. 12-13.

Vision Care Insurance continues for employees who retire as pensioners and for their dependents.

Section IV, p. 16.

If you work beyond your 65th birthday, your noncontributory life insurance continues in force until you retire when, effective at midnight of the last day of the month prior to the day pension begins, $3,000 remains in force for the rest of your life, payable to a beneficiary or estate.

Section II, p. 2.

Life insurance coverage in retirement continues to be paid for by the Company.

. . . .

If you enroll in the contributory life insurance plan when you are first eligible, within 31 days of hire, OR participate in it for at least 15 years before retirement, you continue to be insured in retirement at no cost to you.

In retirement before age 66, the insurance continues in force at 50% of your final annual rate of earnings and is reduced by 5% per year on your 66th, 67th, 68th, 69th, and 70th birthdays. The reduction is effective at midnight at the close of the birthday. If you retire at age 66 or later, the insurance coverage drops to the level designated by your last birthday. At age 70, then, insurance equal to 25% of your last annual rate of earnings is still in force and remains in force for the rest of your life, payable to your beneficiary or estate at time of your death.

Section II, p. 3

The dental health plan covers all full-time salaried employees, retirees, and eligible dependents.

Section V, p. 1.

In *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992) the court found that ERISA sets forth the relevant requirements for a proper summary plan description in the following terms:

Section 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries * * * The summary plan description shall include the information described in section (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan * * *

(b) The plan description and summary plan description shall contain the following information: * * * cir-

cumstances which may result in disqualification, ineligibility, or denial or loss of benefits * * *

29 U.S.C. section 1022(a)(1), (b) (1975). Pursuant to 29 U.S.C. section 1035, the Secretary of Labor is empowered to prescribe necessary regulations and forms. Pursuant to that power, regulations promulgated by the Secretary state that:

> (a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross-references and a table of contents.
>
> (b) General format. The format of the summary plan description must not have the effect to misleading, misinforming, or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description, the page on which the restrictions are described is noted.

29 C.F.R. section 2520.102-2(a),(b) (1988).

The law is clear; a company that has provided welfare benefits to employees and retirees must communicate with the employees in a manner and fashion which fully and fairly apprises them of the extent and limitations of their benefits.

While a plan's summary may be easily understood, it does not fully comply with ERISA if it is not an accurate interpretation of the original pension plan. *McKnight v. Southern Life and Health Ins. Co.* 758 F.2d 1566, 1570 (11th Cir. 1985). It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then claim that any inconsistencies will be governed by the plan. Unfairness will flow to employees for reasonably relying on the summary booklet. *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136, (6th Cir. 1988) (quoting *McKnight v. Southern Life and Health Ins. Co.* 758 F.2d 1566, 1570 (11th Cir. 1985). *See also Hansen v. Continental Insurance Co.*, 940 F.2d 971, 982 (5th Cir. 1991); *Pierce v. Security Trust*, 979 F.2d 23 (4th Cir. 1992); *Govoni v. Bricklayers Masons & Plasterers*, 732 F.2d 250, 252 (lst Cir. 1984) (reliance or prejudice from faulty plan summary is ground for relief); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984) (misleading summary plan description, combined with misleading management representations, preclude summary judgment in favor of employer); *Hoefel v. Atlas Tack Corp*, 581 F.2d 1, 3 (1st Cir. 1978) (enforcing summary of retirement plan) *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); Genter v. Acme Scale and Supply Co., 776 F.2d 1180, 1185 (3d Cir. 1985) (the summary plan description must not mislead, misinform or fail to inform participant and beneficiaries of the plan); *Hurd v. Hutnik*, 419 F.Supp 630, 656-57 (D. N.J. 1976) (despite disclaimer, summary plan statement governs).

Under ERISA, an employer must provide a summary plan description to a participant that describes circumstances which may result in disqualification, ineligibility, or denial or

loss of benefits, written in understandable form, which is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. *Arnold v. Arrow Transp. Co. of Delaware*, 926 F.2d 782 (9th Cir. 1990). Employees are entitled to rely on descriptions contained in summary benefits plan descriptions required by ERISA. Poor drafting of summary benefit plan description required by ERISA may extend or enlarge coverage which would otherwise be unavailable. *Branch v. G. Bernd Co.*, 764 F. Supp. 1527, 1538 (M.D. Ga. 1991).

There are other specific obligations placed on the employer by the Act. One of these obligations relates to the notification that must be afforded the plan participants of their rights under the plan. Congress felt that ERISA's predecessor legislation had failed to provide adequate notification of rights for the plan participants. The Senate report on the Act identified as a source of congressional concern the inadequacy of effective notice of the rights of the plan participants due to the technicalities and complexities of the predecessor's Act's language—language which was all too often misleading or incomprehensive. For expressions of these concerns in House and Senate reports, see H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), reprinted in 1974 U.S.C.C.An. 4639, 4620, and S. Rep. No. 383, 93d Cong., 2d Sess. 18 (1975), reprinted in 1974 U.S.C.C.An. 4639, 4890, 4935. *Pierce v. Security Trust*, 979 F.2d 23 (4th Cir. 1992).

The law is clear, if plan administrators fail to accurately represent the terms of an ERISA plan in an SPD, the undisclosed provisions are ineffective. The Code of Federal Regulations could not make this point clearer—"Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantage and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations." 29 C.F.R. section 2520.102-2(b) (1988); *McKnight*, 758 F.2d at 1570, *Edwards*, 851 F.2d at 136.

As with other portions of this matter the parties disagree of which document or documents constituted an SPD. For example, the following is a portion of the trial transcript, in which defendants lead counsel, Mr. Kavaler explains to the court his position on SPD's:

MR. KAVALER: . . . Your Honor, as you know, under the plans the company is both the sponsor and the plan administrator. The company characterizes documents, and if the company says it's an SPD as a matter of law, your Honor that's how ERISA works—the company is charted with the responsibility of putting out an SPD.

The company could put out a piece of yellow paper on it with a picture of Mickey Mouse, and they could say, "This is the SPD." The Department of Labor could come in and say, "Well, it's deficient." That would be a different question, but if the company says it's the SPD, it's an SPD until someone determines it's not, and with all due modesty, Your Honor, in this situation I am the company. I am telling you what the company called this.

(Tr. 2433-34).

Defendants' position is further spelled out in their trial brief at page 6:

> . . . The provision of these welfare benefits was governed by the Massey-Ferguson, Inc. employee trust agreement and the Massey-Ferguson, Inc. employee benefits plan (with appendices). These two documents incorporated each other by reference, and are hereinafter referred to as the Master Plan. Notwithstanding a lot of

silliness being fostered by plaintiffs' counsel, the Master Plan (and M-F Inc.'s disclosure of its salient provisions) was in all respects legal and proper—it satisfied all the requirements of federal benefits law then in effect. That it is possible to craft a better regime is beside the point; Congress mandated no more than M-F Inc. did.

The bottom line question for the court is which document or documents constituted the SPD in effect when plaintiffs accepted the transfer to MCC. In findings of fact numbers 87-97, the court found that defendants changed the terms of their benefits plans many times. The first change occurred in December 1981, M-F amended its health benefits plan to require contributions from active employees toward the cost of health benefits, effective January 1, 1982. As stated above, this modification was communicated to employees through a December 1981 memorandum from victor Rice, a January 1982 memorandum from Byron Quandt, and a December 1981 insert for *You and M-F*. In January 1983, M-F amended its health benefits plan again. This modification was communicated to employees through a January 1983 memorandum from Gary Fryatt. Replacement or addition pages to insert in *You and M-F* were not prepared. For some reason, at this point, M-F abandoned the practice of producing and distributing replacement pages for *You and M-F*. In December 1983 M-F once again amended its health benefits plan to adopt a new Comprehensive Major Medical Plan for employees and retirees. This modification was communicated to employees and retirees through memoranda and a booklet entitled the Massey-Ferguson Inc. Comprehensive Major Medical Plan. Replacement or addition pages to insert in *You and M-F* were not prepared. As found above, defendants' intended to reissue the Comprehensive Major Medical Plan in the format of the *You and M-F* so that the employees could insert the pages in *You and M-F*. Jill Wellman, the general benefits administration manager of MCC for salaried employees, and others were working on revisions to *You and M-F* in

1984 after the Ruth memo was distributed. This planned action indicates to the court that defendants intended to supplement their chosen vehicle for benefits communication, namely amending *You and M-F*.

As found above, a reasonable person, if he or she received and read the Comprehensive Major Medical Plan, would not understand it to be a notice that defendants were reserving a right to terminate welfare benefits in retirement. Accordingly, exhibit 511, the Massey-Ferguson Inc., Comprehensive Major Medical Plan, by operation of the existing law on SPD's, fails to serve as a vehicle designed to communicate benefits changes "in a manner calculated to be understood by the average plan participant" which was "sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." 29 C.F.R. section 2520.102-2(a) (1988). Therefore, defendants are equitably estopped from asserting section 7.4 as a bar to plaintiffs' claims.[6]

To secure relief on the basis of a faulty summary plan description the claimant must show possible prejudice flowing from the summary. *Anderson v. Alpha Portland Industries Inc.*, 836 F.2d 1512, 1520 (8th Cir. 1988) (quoting *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986), *cert denied*, 479 U.S. 962, 107 S.Ct. 460, 93 L.Ed.2d 406 (1986). Here the evidence is clear, plaintiffs were unaware that the company reserved the right to terminate, amend or modify the plan. The evidence at trial supports the finding that prior to accepting the transfer to MCC plaintiffs were concerned with the continuation of their benefits. With the communication of the Porter letter, the side-by-side comparisons, and reference to *You and M-F*, the reasonable plan participant relied to their detriment on the reasonable belief that their benefits could not be terminated after taking retirement from MCC. *See generally Henalein v. Informal Plan for plant Shutdown Ben. For*

[6] The court realizes that traditionally equitable estoppel is a defense, however given the emerging case law and the posture of this case the court concludes that it is appropriate to recognize equitable estoppel as an independent cause of action. *See Fitch*, 795 F.Supp. at 906-07; *Kane*, 893 F.2d at 1285-86.

Salaried Employees, 974 F.2d 393, 400-01 (3rd. Cir. 1992). As mentioned in paragraphs 58-101 and exhibits A, B, and 114.

The question for this court then follows, were the statements on the extent and coverage of benefits to be provided at MCC, found in exhibits A and B, which were presented to then MF employees to induce acceptance of their transfer to MCC, sufficient to cause reliance on the language then found in the SPD—*You and M-F*? After a careful review the court concludes they were. Further, this court must answer the question; did the reasonable expectations of the plaintiffs, when relying on exhibits A, B and 114 create a modification of the plan. After a careful review of the law on deficient SPD's the court concludes that an effectively communicated modification was *not* created. The M-F plan is still in place and providing benefits to M-F retirees. Therefore, the court finds that the defendants are equitably estopped from any right to amend or terminate the plan.

Having found plaintiffs' claim for recovery meritorious under this theory of equitable estoppel the court does not now need to address plaintiffs' claims under promissory estoppel.

MCC—TERMINATED CLASS

The estoppel claims of this subclass of plaintiffs are denied for the same reasons as set forth above in pages 60-63 [97a-100a], when the court is discussing the breach of fiduciary duty made by this subclass. (i.e. that employment conditions at MF for this subclass were going to change because large losses would have dictated that layoffs would have been forthcoming in any event.)

FRAUDULENT MISREPRESENTATION—COUNT 5

Discussion of plaintiffs' fraudulent misrepresentation claim is discussed on pages 25-27 [44a-45a], in the court's order on motions for new trail and judgment as a matter law. The court therein denied all claims advanced by the plaintiffs and set aside the jury verdict on the fraudulent misrepresentation claim.

PUNITIVE DAMAGES

The availability of punitive damages in ERISA cases bought under ERISA section 502(a)(3), 29 U.S.C. section 1132 (a)(3) is a question of great importance in this case. Both sides of this lawsuit have file extensive briefs on this issue. Both sides raised interesting and compelling arguments in support of their positions. After a review of the briefs and several rounds of oral arguments this court determined that this issue had never been ruled on *directly* by either the United States Supreme Court or the Eighth Circuit Court of Appeals. Out of an abundance of caution and a desire to see that a full record was developed in order to aid appellate review this court submitted the question of punitive damages to the jury in this matter. The jury returned a verdict awarding punitive damages on the three counts submitted to them in the amounts of $33,000,000 against Varity and $3,000,000 against MF.

Following the conclusion of the trial portion of this case and prior to the arguing of post-trial motions the Eighth Circuit Court of Appeals issued its opinion in *Novak v. Anderson corp.*, 962 F.2d 757 (8th Cir.1992). In *Novak* the court defined what the term "other appropriate equitable relief" under section 1132(a)(3) entails. The *Novak* court, after a review of the legislative history, found that "other equitable relief" was defined to include only that relief which was declaratory or injunctive or the imposition of a constructive trust.

In light of *Novak* this court must now deny plaintiffs' request for punitive damages and sustain the defendants motion to strike the award of punitive damages. If the Court of Appeals concludes that punitive damages are available under section 1132(a)(3), this court is prepared to review the advisory jury's punitive damage award in conjunction with this court's independent factual findings. Naturally, this court would revisit the parties arguments in relation to due process considerations and other related constitutional issues connected with a potential award of punitive damages.

CONCLUSION

The economy in the agricultural regions of this county in the 1980's was turbulent and difficult. Varity and Massey Ferguson were in no different a situation than any of the other agricultural equipment manufacturers experiencing tough financial constraints during this period. However, in the face of difficult financial times Varity disregarded existing law and devised a plan which dramatically cut its debt burden and heritage costs. Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company and who had been induced into believing that their benefits coverage could not be terminated once they retired. ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

THEREFORE IT IS HEREBY ORDERED that the court having found in favor of the plaintiffs' MCC-Retired subclass and the Individual Plaintiffs on their claim of equitable estoppel and breach of fiduciary duty orders that the plaintiffs shall within 20 days of the date of this order make an election of remedies. The remaining plaintiffs may either choose to accept the jury's award as set out in this court's order on motions for judgment as a matter of law and motion for new trial, or choose the relief set out below, which includes reinstatement to the M-F plan. If the MCC Retired Class and/or individual plaintiffs so elect, judgment will be entered as follows:

1. Judgment for compensatory damages is awarded and judgment to be entered against the defendants in favor of the MCC-Retired subclass in the amount of $696,195.

2. Judgment for compensatory damage (actual expenses) is awarded and judgment is to be entered against the defendants in favor of the Individual Plaintiffs in the following amounts:

Individual Plaintiffs	*Amount*
John Altomare	$ 5,000
Charles Barron	3,160
Alexander Charron	7,661
Charlotte Chiles	13,106
Anita Crowe	11,877
Ray Darr	1,700
Doris Guidicessi	8,219
Barnett Lucas	3,150
Robert Skromme	18,284
Estate of Walter Smith	10,655

3. The defendants are directed to and permanently enjoined to reinstate the members of the MCC-Retired subclass and the Individual Plaintiffs to the M-F Plan as it existed on the dates of those plaintiffs' retirement. The court will retain jurisdiction to resolve any questions concerning the terms of the plan in the context of this permanent injunction.

4. The court retains jurisdiction to determine the amount of any damages to the MCC-Retired subclass and the Individual Plaintiffs for benefits accrued but not paid between the time of trial and the date they are reinstated to the plan.

IT IS FURTHER ORDERED that all claims on behalf of the MCC Terminated subclass are denied.

MARCH 26, 1993

/s/ DONALD E. O'BRIEN
DONALD E. O'BRIEN, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2319

Submitted: October 11, 1989

Filed: February 15, 1990

Charles Howe; Robert Wells; Ralph W. Thompson; Charlotte Chiles; Patrick Mousel, On behalf of themselves and as representatives of a Class of Persons Similarly Situated,

Appellees,

—v.—

Varity Corporation and Massey-Ferguson, Inc.,

Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

Varity Corporation (Varity) and Massey-Ferguson, Inc. (M-F Inc.) appeal from a preliminary injunction issued by the district court requiring them to reinstate portions of a terminated employee welfare benefit plan. We reverse in part and affirm in part.

BACKGROUND

M-F Inc., which makes farm equipment, is wholly owned by Varity. M-F Inc. maintains a comprehensive health and welfare benefit plan for its employees and retirees. Section 7.4 of the "Master Plan" contains the following language:

> **to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employee shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.**

In the late 1970's M-F Inc. began having financial difficulties which continued through 1986. On May 9, 1986, Varity transferred a portion of M-F Inc.'s operations to a newly-created Canadian corporation, Massey Combines Corporation (MCC). As part of this restructuring, known as "Project Sunshine," approximately 1500 employees of M-F Inc. and other Varity subsidiaries were transferred to MCC. In addition, MCC assumed the obligations of M-F Inc. and other Varity subsidiaries to provide welfare benefits to 3500-4000 retirees. Because MCC adopted M-F Inc.'s welfare plan verbatim, however, this restructuring did not immediately affect the welfare benefits of M-F Inc. employees and retirees.

MCC's financial condition quickly slid downhill. On March 4, 1988, MCC went into receivership in Canada and terminated all of its employees. MCC's receiver sent notice to all former employees, retirees, and other plan beneficiaries indicating there were no funds available to continue welfare benefits. All welfare benefits immediately ceased.

This suit was brought pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982), by representatives of former salaried employees,

retirees, disabled employees, and eligible dependents of retirees and disabled employees of M-F Inc. who were transferred to MCC in 1986 through the Project Sunshine restructuring. Plaintiffs sought an order requiring Varity and M-F Inc. to restore benefits to retirees, disabled employees, and their survivors and eligible dependents.[1] The district court granted plaintiffs' motion for a preliminary injunction, finding that the welfare benefit plan entitled retirees to continued benefits throughout their lifetimes.[2] This interlocutory appeal followed.

DISCUSSION

A. Benefits of Retirees

The district court based its order of preliminary relief on the ground that welfare benefits vested upon retirement and could not thereafter be terminated by MCC or defendants. Since we deal here only with welfare benefits (medical, dental, disability, and life insurance), ERISA's mandatory vesting requirements relating to pension rights do not apply. 29 U.S.C. § 1051(1) (1982). The issue we confront is "simply one of contract interpretation." *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988) (quoting *Local Union No. 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985)). Welfare benefit plans may be modified or terminated absent the employer's contractual agreement to the contrary. *Anderson*, 836 F.2d at 1516-17.

---

1 The court conditionally certified the class "for the narrow purpose of effectuating the preliminary injunction." In view of our reversal on the issuance of the preliminary injunction as to the conditional class as a whole, we need not pass on the propriety of the conditional certification. See part B of our discussion.

2 The district court's analysis is contained in a 51-page Memorandum and Order adopted verbatim from a memorandum submitted by plaintiffs in support of their motion. Despite our disapproval of this judicial practice, *see Jones v. International Paper Co.*, 720 F.2d 496, 499 (8th Cir. 1983), these findings and conclusions are nevertheless formally those of the district court, and we must examine the record for support of these findings and conclusions. *Id.*

Plaintiffs argue that the contractual language contained in the plan documents constitutes a promise that welfare benefits vest for life upon an employee's retirement. The district court held that Section 7.4, which secures an employee's right to claim benefits to which the employee "shall have become entitled" prior to termination of the plan, constitutes explicit vesting language. In addition, the court found that past company practice and summary plan documents stating that welfare benefits "continue in retirement" establish retirement as a vesting point.

The district court's ruling is based on an erroneous view of the law.[3] Plaintiffs have the burden of proving vested welfare benefits. *Anderson*, 836 F.2d at 1517. In *Anderson* we held that this burden was not met by the employer's promise to provide welfare benefits "until death of retiree" where the employer had expressly reserved the right to terminate or amend the plan. *Id.* at 1518. Similarly, in *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 1305 (1989) we held that an employer's promise to future retirees that benefits "will continue" could not be read as a promise of vested lifetime benefits in the face of a termination clause. *Id.* at 814, 816-17.[4]

---

3 We recognize that a preliminary injunction is ordinarily reviewed under an abuse of discretion standard. *Dataphase Sys. Inc. v. CL Sys. Inc.*, 640 F.2d 109, 114 & n.8 (8th Cir. 1981) (en banc). However, an appellate court reviewing the grant or denial of a preliminary injunction may also determine whether the district court based its decision on an erroneous legal premise. *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *O'Connor v. Peru State College*, 728 F.2d 1001, 1002 (8th Cir. 1984). We therefore may reach the legal issues at the heart of the case. *See Calvin Klein*, 815 F.2d at 504 (appellate court may review legal conclusions where it is plain that lower court's ruling is "inextricably bound up in its view of the law").

4 The Supreme Court's remand of DeGeare was based on its decision in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989). In *DeGeare*, we held as an initial matter that a plan fiduciary's interpretation of plan terms was entitled to deference on review. *DeGeare*, 837 F.2d at 814-15. We went on to hold, however, that "*[i]n any event*, * * * the administrator and district court *correctly construed* the plan documents

After a careful review of the plan documents, we find nothing that allows plaintiffs to escape these holdings. Section 7.4 of the plan does not itself pinpoint retirement as a vesting trigger. Section 7.4 merely protects an employee's right to claim benefits for an injury or disabling event that occurs prior to termination of the plan.[5]

As *Anderson* and *DeGeare* make clear, the mere fact that employee welfare benefits continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits. *DeGeare*, 837 F.2d at 815; *Anderson*, 836 F.2d at 1516-17. Indeed, the benefits at issue here are "retirement benefits" in a technical sense only. Unlike pension benefits, coverage under the welfare benefit plan does not begin at an employee's retirement. Rather, as plaintiffs themselves strenuously argue, the welfare benefits simply continue when an employee retires. Nothing in the documents establishes retirement as a vesting point.

The district court's reliance on extrinsic evidence is also misplaced. The court found that in the past defendants had exempted retirees from plan changes, thereby implying that retirees' benefits were "untouchable." As a general rule, however, extrinsic evidence may not be relied upon where the documents are unambiguous on their face. *See. e.g.*, *Anderson*, 836 F.2d at 1517 ("[I]f the contract is deemed

* * *." *Id.* at 815. We then applied the contract interpretation principles established in our prior cases. *Id.* at 815-16.

Bruch's holding that the plan fiduciary is entitled to deference in construing terms only when the plan expressly reserves the right to do so did not affect the principles underlying the central part of our decision in *DeGeare*. *See Bruch*, 109 S. Ct. at 956; *see also Lakey v. Remington Arms Co.*, 874 F.2d 541, 543-44 (8th Cir. 1989) (explaining the effect of *Bruch*). Thus, we disagree with the district court's conclusion that the remand of *DeGeare* leaves this circuit's law "up in the air." The basic contract interpretation principles of *DeGeare* and *Anderson* still apply.

[5] For example, if a covered employee were to break a bone one day before the plan is terminated, that employee would be "entitled" to medical expense reimbursement for the injury.

ambiguous, *then* the court may weigh extrinsic evidence to aid in its construction.") (quoting *Dubuque Packing*, 756 F.2d at 69) (emphasis added). Moreover, it is the extrinsic evidence itself, in our view, that is ambiguous. Merely because defendants chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so. Plaintiffs have not argued estoppel, nor have they suggested any detrimental reliance on defendants' practices. This evidence therefore does not aid plaintiffs in meeting their burden of proof.

We hold that the district court erred in granting the preliminary injunction on the ground that the welfare plan could not be terminated as to retirees.

B. Propriety of Preliminary Injunction as to Subclasses

The district court's injunction reinstates all retirement and disability benefits as they existed immediately prior to March 4, 1988, the date MCC went into receivership. As our holding above makes clear, retirees as a general class are no longer entitled to these benefits. Varity and M-F Inc. concede, however, that Section 7.4 establishes an "entitlement" in favor of beneficiaries who became injured or disabled prior to plan termination.[6] Therefore, MCC was not at liberty to terminate payments to these persons. However, MCC is presumably without funds to pay these benefits and is not a party to this lawsuit. Thus, beneficiaries with vested rights are left to look solely to Varity and M-F Inc. for satisfaction of their claims.

This observation requires us to consider two subclasses of beneficiaries. The first subclass consists of persons who became injured or disabled (and thereby vested) prior to May

[6] Defendants concede Section 7.4 is a "pipeline" provision which protects employees and retirees against termination of benefits once they suffer an injury or illness. The plan language indicates that disabled persons fall within this group and are thus entitled to continued disability benefits if their disability occurred prior to the plan termination date. The plan makes clear that these disability benefits may be terminated only upon the employee's death, attainment of age 65, or end of disability, whichever comes first.

9, 1986, the date they were transferred to MCC. We disagree with defendants' argument that these beneficiaries must look solely to MCC for recovery. M-F Inc.'s contractual obligations to provide health and disability benefits to this group had fully ripened prior to the 1986 transfer and could not be discharged by a transfer of the obligations to MCC. It is fundamental that an assignment will not discharge the assignor's debt to a third party without the third party's consent. *E.g.*, 4 A. Corbin, *Corbin on Contracts* § 866 (1951). The record is not clear, but assuming there are members of the conditional class who became entitled to welfare benefits by reason of injury or disability before May 9, 1986, then the preliminary injunction shall continue as to these persons.

The second subclass consists of persons whose benefits became vested by reason of an injury or disability occurring *after* the 1986 transfer but *before* MCC went into receivership on March 4, 1988. Defendants appear to suggest that the transfer of these persons to MCC relieved both Varity and M-F Inc. of all continuing benefits obligations. The district court disagreed, finding defendants liable for these obligations under three alternative theories: (1) as "alter egos" of MCC; (2) as "employers" under ERISA, *see* 29 U.S.C. § 1002(5) (1982), or; (3) as plan fiduciaries, *see id.* §§ 1002(21)(A), 1109. We are convinced that resolution of these issues depends on a more fully developed record and more carefully-considered factual findings than those before us. We do not accept the district court's adoption of plaintiffs' proposed findings as a final determination of the factual issues involved under these theories. Such "mechanically adopted" findings "do not reveal the discerning line for decision" on the factual issues establishing defendants' liability. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

Nevertheless, we find reasonable probability that the members of this subclass may be able to prove defendants liable under one or more of these theories. At the present time, we are satisfied that the district court did not abuse its equitable powers in granting this aspect of the preliminary injunction on the proposed findings it adopted. However, the district

court must now independently determine whether the record supports defendants' liability as to those persons who became entitled to benefits between May 9, 1986, and March 4, 1988.

Although the record is not completely clear on the issue, it appears that the named plaintiffs in this case do not fall within the two subclasses we have discussed.[7] However, the record does disclose the existence of some unnamed members of the conditional class who may fall within these groups.[8] Class representatives must have a personal stake in the outcome of the case at the time the district court rules on class certification in order to prevent mootness of the action. *E.g.*, *Inmates of Lincoln Intake & Detention Facility v. Boosalis*, 705 F.2d 1021, 1023 (8th Cir. 1983). In addition, plaintiffs purporting to represent a class must satisfy the requirements of Federal Rule of Civil Procedure 23. Because the named plaintiffs in this case sought relief on their claim that welfare benefits were vested as to all retirees, the district court conditionally certified a broad class for purposes of preliminary relief. In light of our ruling today, the class conditionally certified by the district court is too broad and cannot serve as the class for purposes of final judgment. The district court must now reevaluate the case under Rule 23 and redefine the class in accordance with this opinion. This may require substitution of suitable class representatives. *Cf. Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration of class definition and substitution of class representatives where named plaintiffs' claims have become moot).

---

[7] Affidavits in the record indicate plaintiffs Howe, Thompson, Chiles, and Mousel did not suffer disability or uncompensated injury prior to March 4, 1988. The record before us is devoid of information concerning the remaining named plaintiff, Robert Wells.

[8] Affidavits in the record indicate that Harold Lynam suffered a disabling heart attack while working for M-F Inc. in April, 1986; that Roy Mahon had his leg amputated and suffered aneurysms in January, 1988.

CONCLUSION

We reverse the grant of the preliminary injunction as to the general class of persons conditionally certified by the district court. We affirm the district court's issuance of the preliminary injunction as to plan beneficiaries who are members of the class conditionally certified by the district court and who became disabled or otherwise entitled to benefit payments prior to the March 4, 1988.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2056/2111SIDM

Charles Howe, *et al*,

Appellees,

—v.—

Varity Corporation, *et al*,

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Hansen would grant the petition. The petition for rehearing by the panel is also denied.

December 5, 1994

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

ERISA §§ 3(1), (2)(A), (21)(A), 29 U.S.C. §§ 1002(1), (2)(A), (21)(A) (1988)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * *

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

ERISA §§ 101(a), (b), 29 U.S.C. §§ 1021(a), (b) (1988 & Supp. V 1993)

(a) Summary plan description and information to be furnished to participants and beneficiaries.

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan -

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988)

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

ERISA §§ 103(a)(1), (b), (c), 29 U.S.C. §§ 1023(a)(1), (b), (c) (1988)

(a) Publication and filing [of annual reports]

(1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(b) Financial Statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan; a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

* * *

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceeding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such sched-

ule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interst): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date. the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust,

such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other

information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993)

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

ERISA § 105, 29 U.S.C. § 1025 (1988 & Supp. V 1993)

(a) Statement furnished by administrator to participants and beneficiaries

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports

In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) of this section during any one 12-month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations

Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

ERISA § 201(1), 29 U.S.C. § 1051(1) (1988)

§ 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefit plan . . . .

ERISA § 203(a), 29 U.S.C. § 1053(a) (1988 & Supp. V 1993)

§ 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100

(C) A plan satisfies the requirements of this subparagraph if—

(i) the plan is a multiemployer plan (within the meaning of section 3(37)), and

(ii) under the plan—

(I) an employee who is covered pursuant to a collective bargaining agreement described in section 1002(37)(A)(ii) of this title and who has completed at least 10 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions, and

(II) the requirements of subparagraph (A) or (B) are met with respect to employees not described in subclause (I).

(3) (A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of the title).

(B) A right to an accrued benefit from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph,

including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(C)(8) of this title.

(D) (i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E) (i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of Title 26) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of Title 26, an excess deferral under section 402(g)(2)(A) of Title 26, or an excess aggregate contribution under section 401(m)(6)(B) of Title 26.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988)

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

ERISA § 409, 29 U.S.C. § 1109 (1988)

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA §§ 502(a), 29 U.S.C. § 1132(a) (1988 & Supp. V 1993), as amended

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State of enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

[1]*

MASSEY-FERGUSON INC.
COMPREHENSIVE MAJOR MEDICAL PLAN

NOTE: THIS IS A SUMMARY OF THE PLAN. IF THERE ARE DISCREPANCIES BETWEEN THE SUMMARY AND THE PLAN DOCUMENT, THE PLAN DOCUMENT WILL PREVAIL.

* Bracketed numbers indicate beginning of page in original document.

[2]

TABLE OF CONTENTS

[3] 1

COMPREHENSIVE MEDICAL PLAN
SCHEDULE OF BENEFITS

Effective Date: January 1, 1984

Eligible Class: All U.S. Salaried-Non-Bargaining Employees; U.S. Salaried Perkins Engines - Non-Bargaining Employees; and U.S. Salaried Pensioners, Survivors and LTD claimants - Non-Bargaining.

Waiting Period: 31 days continuous active service, for new hires and rehires.

Spouse: For purposes of this plan—wife or husband while not divorced or legally separated from you.

Dependent Children: Age Limit—end of calendar year in which the dependent attains age 25. Coverage for permanently disabled unmarried children continues.

COVERED BENEFITS

Cash Deductible:

Individual	$100 per Calendar Year
Family	$200 per Calendar Year

All covered family members may contribute to the family deductible.

Coinsurance: 80% of eligible covered expenses with the exception of those outlined below.

Out-Of-Pocket Maximum:

Individual	$1,000 per Calendar Year
Family	$2,000 per Calendar Year

All covered family members may contribute to the out-of-pocket deductible.

(Note: Coinsurance related to treatment received for nervous and mental disorders alcoholism and drug abuse and any expenses incurred following

expiration of the duration limits shown on Page 2 are not applied to the out-of-pocket maximum.)

Aggregate Lifetime Maximum: $250,000.00 per covered individual with restoration of up to $1,000.00 per calendar year.

Covered Expenses Paid at 100%:

- •Emergency Care for Accidental Injury or Life Threatening Illness
- •Second Surgical Opinion Only (Deductible Waived)—Mandatory for Listed Procedures
- •Outpatient and Ambulatory Surgery (Charges for Approved Facility Only)—Mandatory for Listed Procedures
- •Pre-Admission Testing
- •Extended Care Facility
- •Home Health Care
- •PAID Prescription Drug Coverage ($2.00 Deductible)
- •Hearing Aid Benefit (Deductible Waived)

[4] 2

SCHEDULE OF BENEFITS—Continued

LIMITATIONS AND EXCEPTIONS

Maximum Daily Private or Semi-Private Room and Board Rate will be considered at 100% of the hospital's charge for the highest priced semi-private accommodations subject to deductible and coinsurance. In other accommodations—will be considered at 100% of the full charge made subject to deductible and coinsurance.

Nervous and Mental Disorder and Alcohol and Drug Abuse Limits—

Coinsurance—Outpatient	50%
—Inpatient	80%
Lifetime Maximum	$25,000

Second Surgical Opinion—If a second opinion is not obtained on Listed Procedures, the Plan will only pay 65% of the covered surgical fee.

Outpatient and Ambulatory Facility—If a listed Procedure is performed on an inpatient basis, room and board expenses will not be paid, unless confinement is for an emergency or is medically necessary.

Duration Limits—

Inpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	90 Days per Calendar Year
Outpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	50 Visits per Calendar Year
Extended Care Facility	120 Days per Period of Confinement or Calendar Year
Home Health Care	60 Visits at 4 Hours per Visit

Room and Board Charge for Weekend Admission (Friday afternoon through Sunday morning) for elective and/or non-emergency surgery will not be paid.

Hearing Aid Benefit

Audiometric Examination	$30.00
Hearing Aid Evaluation Test	$30.00
Hearing Aid, Including Mold	$275.00

(Note: Benefits are available for each subsequent hearing aid once every three years.)

THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME.